St. Barnabas Medical Center *and* New Jersey Nurses Union, affiliated with the Communications Workers of America, AFL–CIO as Local 1091. Case 22–CA–23092

December 16, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On September 10, 2002, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to recognize the Union as the bargaining representative of certain classifications of registered nurses (RNs) and by failing to apply the terms of the collective-bargaining agreement to them "within the meaning of Section 8(d)." The Respondent contends that the complaint is time barred under Section 10(b) of the Act. We find that the Respondent has raised a valid affirmative defense by showing that the Union had clear and unequivocal notice, outside the 6-month limitations period, that the Respondent repudiated the contract by refusing to apply it to employees in the disputed classifications. Accordingly, we shall reverse the judge's decision and dismiss the complaint without reaching the merits of the unfair labor practice allegations.

I. FACTS

The Respondent, St. Barnabas Medical Center, operates a large hospital in Livingston, New Jersey, containing approximately 600 beds. In 1991, the Union was certified as the exclusive bargaining representative of the following unit of employees:

> All full-time and regular part-time registered nurses and graduate nurses, including charge nurses and IV therapists, employed by the Employer at its Livingston, New Jersey facility, but excluding all office clerical employees, graduate practical nurses and licensed practical nurses, infection control employees, utilization review employees, home health care coordinators, in-service instructors, nursing instructors, computer coordinators, nutrition specialists, anesthesiology coordinators, other professional and nonprofessional employees, other technical employees, service and maintenance employees, engineers, managerial employees, nursing coordinators, temporary employees, guards and supervisors, including head nurses and radiology nurse specialists, as defined in the Act, and all other employees.

Thus, by its terms, the unit included some nonsupervisory RNs and excluded others.

Since 1991, the parties have negotiated and executed four successive collective-bargaining agreements (1991–1993, 1993–1996, 1996–1999, and 1999–2002) covering that same unit. Each of these agreements contains the same recognition language.

In or about 1989, the Respondent created a new patient care coordinator (PCC) position. In the mid-990s, friction developed between the parties when the Union alleged that one or more of the PCCs was performing bargaining unit work. In a February 1995 memo from Union Executive Director Sondra Clark to the Respondent's human resources director, Martin Marino, the Union contended that this was in violation of the collective-bargaining agreement, although the Union never filed a grievance on that basis. Instead, the Union sought a determination from the Respondent whether the individual PCC in question was in or out of the unit. Additionally, the Union requested the identity of all PCCs and a copy of the PCC job description.

By letter in April 1995, the Respondent refused the Union's information request on the grounds that the employee in question was not part of the unit and therefore the Union was not entitled to the other information sought. Upon receiving this response, the Union filed an unfair labor practice charge based on the Respondent's refusal to provide the requested information.[3]

Meanwhile, between March and July 1997, the Union learned that the Respondent was not applying the contract to RNs in the radiology, employee health, and car-

[1] No exceptions were filed to the judge's dismissal of the complaint allegation that the Respondent unlawfully excluded patient care coordinator registered nurses (PCC RNs) and an advanced practice nurse manager from the collective-bargaining unit. The judge found both the PCC RNs and the advanced practice nurse manager to be supervisors under Sec. 2(11) of the Act.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] This charge was ultimately resolved by a non-Board settlement in which the Respondent provided the requested information to the Union.

diac catheterization lab departments.[4] By memo dated July 8, 1997, and received by the Respondent on August 12, 1997, the Union made a formal demand for recognition of two PCCs, as well as for the radiology RNs, employee health unit RNs, and cardiac catheterization RNs.

In response to the Union's demand, the Respondent agreed to meet with the Union in October 1997 and again in January 1998. At the October 1997 meeting, Marino reiterated the Respondent's position to Executive Director Clark and Union Co-chair Karen May that none of the disputed classifications belongs in the bargaining unit. However, Marino proposed that a "package deal" could be worked out, whereby the Respondent would include all but one radiology RN in the unit, and exclude the RNs in the employee health and cardiac catheterization laboratory departments. Marino told the Union that this proposal was conditioned on the Union's agreement to resolve all of the disputed classifications at once, and that if the parties could not agree on all of the outstanding classifications, the Union would have to pursue the matter through the Board. The Union rejected Marino's proposal.

In the subsequent January 1998 meeting, Marino again advanced the Respondent's position that the disputed classifications of RNs did not belong in the bargaining unit. However, Marino proposed that if the Union were to withdraw a pending Board charge alleging that the Respondent had unlawfully failed to provide requested information concerning the PCC positions, the Respondent would agree to include both radiology and catheterization lab RNs in the unit. The Union again rejected Marino's proposal, and at no time filed an unfair labor practice charge with the Board concerning Marino's conduct at either the October or January meetings.

In February 1998, the Union learned that the Respondent was recruiting RNs to the position of case manager. Later that year, in June 1998, the Union also learned that there were nonsupervisory RNs working in the Pediatric Oncology Outpatient Clinic, as well a single RN working in the Pediatric Clinic.

The parties met again on June 2, 1998. At this meeting, the Union communicated to Marino its intention to add three classifications—the case manager, pediatric oncology, and pediatric clinic positions—to the list it had supplied to Marino in its initial demand for recognition. In response, Marino asked the Union to submit a "fresh list" of RN classifications to him. The Union submitted a list the following day, June 3, 1998, seeking recognition of a total of 14 classifications.[5] Between July and October 1998, Clark left three telephone messages for Marino seeking a response to the June 3 memo. The Respondent never responded to these communications.

On December 21, 1998—17 months after the Union's initial July 1997 demand—the Union filed a charge alleging the Respondent's refusal to bargain with the Union regarding employees in 14 classifications. The Union later withdrew its demand for recognition as to several of these classifications and limited its demand to the following RN positions at issue in the instant case: (1) employee health; (2) cardiac catheterization laboratory; (3) case manager; (4) radiology; (5) pediatric oncology outpatient clinic; and (6) pediatric clinic.

II. THE JUDGE'S DECISION

The judge rejected the Respondent's 10(b) defense that the complaint is time barred based on his finding that the Union never received clear and unequivocal notice, at any time prior to filing its charge on December 21, 1998, that the Respondent rejected the Union's demand for recognition of the disputed classifications of RNs and that the Respondent apply the contract to them. For the reasons discussed below, we disagree with the judge on this issue. We instead find that the Respondent has satisfied its burden of showing that the Union had clear and unequivocal notice of a completed violation of the Act at least as early as July 1997—17 months prior to the filing of the charge. We further find, under the circumstances of this case, that the Respondent's conduct outside the 10(b) period amounted to a repudiation of the contract, rather than a breach of the contract terms, and that the 10(b) period thus began to run at the moment the Union was on notice of the Respondent's repudiation. Accordingly, we conclude that Section 10(b) is a complete bar to recovery for the Union in this case.

III. DISCUSSION

Section 10(b) provides that "no complaint shall be based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b). However, this limitations period does not begin to run until the charging party has "clear and unequivocal notice," either actual or constructive, of a violation of the Act. *Leach Corp.*, 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995). A party will be charged with constructive knowledge of an

[4] The judge found that it was "[i]n about August 1997," that the Union first learned of the nonsupervisory cardiac catheterization RNs working at the Hospital. However, it is clear from the testimony of Union Executive Director Sondra Clark that it was July 1997 that she first learned that there was a nonsupervisory RN working in the lab. This testimony is consistent with the undisputed evidence that the Union submitted its formal demand for recognition of the cardiac catheterization RNs (along with three other classifications) in July 1997.

[5] The Respondent acknowledges receipt of the list and that it did not respond to it.

unfair labor practice where it could have discovered the alleged misconduct through the exercise of reasonable diligence. *Moeller Bros. Body Shop*, 306 NLRB 191, 193 (1992) ("While a union is not required to police its contracts aggressively in order to meet the reasonable diligence standard, it cannot with impunity ignore an employer or a unit . . . and then rely on its ignorance of events occurring at the shop to argue that it was not on notice of an employer's unilateral changes."). See also *John Morrell & Co.*, 304 NLRB 896, 899 (1991) (10(b) period begins to run when "aggrieved party knows or should know that his statutory rights have been violated").

The burden of showing such notice is on the party raising the affirmative defense of Section 10(b). *Chinese American Planning Council*, 307 NLRB 410 (1992).

When the alleged unfair labor practice may be characterized as a contract repudiation, the unfair labor practice occurs at the moment of the repudiation, and the 10(b) period begins to run at the moment the union has clear and unequivocal notice of that act. "Once a party has notice of a clear and unequivocal contract repudiation . . . a dispute is clearly drawn. Indeed, it is at the moment of that repudiation that the unfair labor practice—the refusal to bargain—fundamentally occurs." *A&L Underground*, 302 NLRB 467, 469 (1991). Under these circumstances, if the repudiation occurred outside the 10(b) period, all subsequent failures of the respondent to honor the terms of the agreement are deemed consequences of the initial repudiation for which the union may not recover. Id.

By contrast, cases not barred by Section 10(b) "include cases in which a respondent has not given clear notice of a total contract repudiation outside the 10(b) period, but has simply breached provisions of the collective-bargaining agreement to a degree that rises to the level of an unlawful unilateral change in contractual terms and conditions of employment. . . . That the respondent might, for example, have failed to make some contractually required payments in the past is immaterial, because those occurring within the limitations period form self-contained unfair labor practices and bear no real relation to the past breaches." Id. See also *Farmingdale Iron Works*, 249 NLRB 98, 99 (1980), enfd. 661 F.2d 910 (2d Cir. 1981). In these circumstances, while statutory relief will not reach back to conduct that occurred before the 10(b) cutoff date, the fact that the initial violation of the Act may have occurred before that date will not bar an unfair labor practice charge predicated on an employer's continuing failure, within the 10(b) period, to abide by the contract's terms. Thus, the charging party may recover for those violations occurring within the 6 months preceding the charge. Id.

For the reasons stated below, we find that the Union had clear and unequivocal notice outside the 10(b) period that the Respondent refused to apply the contract to employees in the disputed classifications. We further find that this refusal falls within the repudiation line of cases and that the complaint is time barred.

A. The Union had Clear and Unequivocal Notice of the Alleged Unfair Labor Practice Outside the 10(b) Period

Applying the above principles to the instant case, we first take issue with the judge's analysis concerning the Union's notice of the conduct alleged to be unlawful. Specifically, we disagree with the judge's reasoning that the 10(b) period did not begin to run until after the Union realized that it was not going to receive a response from the Respondent to the Union's *last* demand for recognition of the disputed RNs in June 1998. Instead, Board precedent holds that the 10(b) period begins to run at the time the Union *first* has "knowledge of the facts necessary to support a ripe unfair labor practice." *Leach,* supra.[6] Here, it is undisputed that the Union was acutely aware, long before 6 months prior to the filing of the charge, of each element of the alleged unfair labor practice—the existence of employees in classifications allegedly covered by the contract and the Respondent's refusal to recognize the Union as the bargaining representative of these employees or to apply the collective-bargaining agreement to them.

The Union knew from at least July 1997, the date of its formal demand for inclusion of the first four disputed classifications (PCCs, radiology RNs, employee health unit RNs, and cardiac catheterization RNs), that the Respondent was not applying the collective-bargaining agreement to these employees or recognizing the Union as their representative. Notwithstanding the Union's actual knowledge[7] of the Respondent's alleged unlawful conduct, the Union made an informed and conscious decision not to file an unfair labor practice charge at that time. The Union did not base this decision on any representations or promises by the Respondent that it would remedy the Union's complaint. To the contrary, the Re-

[6] As noted above, a party may also be charged with constructive knowledge of an unfair labor practice when the party has failed to exercise due diligence. In this case, we have found that the Union had actual knowledge of the unfair labor practices more than 6 months before it filed a charge.

[7] Because we find that the Union had actual knowledge of the alleged unfair labor practices more than 6 months prior to its filing of a charge, we need not pass on the judge's finding that the Union lacked constructive knowledge of the Respondent's alleged unlawful conduct.

spondent consistently maintained that it had no obligation to apply the contract to the disputed RNs. Thus, the Union made its decision not to act at its own peril.

With respect to the remaining disputed classifications (case managers, pediatric oncology, and pediatric clinic RNs), the Respondent's conduct in negotiations with the Union from October 1997 through June 1998 reinforced the Respondent's position that it did not consider the disputed classifications to be in the unit. In his successive meetings with the Union during this time, Human Resources Director Marino repeatedly made the Union aware that the Respondent was not going to favorably resolve the matter of extending the collective-bargaining agreement to all of the classifications that were the subject of the Union's initial July 1997 demand,[8] nor the additional classifications for which the Union sought information and coverage in discussions with the Respondent through June 2, 1998. At no time during these discussions did Marino make any commitment to the Union that the Respondent would remedy the problem; nor did Marino do anything to mislead the Union or conceal from the Union its position, steadfastly held, that the disputed RNs were not, and should not, be covered by the contract. Accordingly, at least by June 2, 1998, the Union had clear and unequivocal notice that the Respondent was refusing to apply the contract to the disputed RNs. Thus, the complaint is barred by Section 10(b).

Our colleague reads too much into the Respondent's nonresponse to the Union's letter of June 3. That letter simply listed the classifications that the Union claimed to be in the unit. It was clear at that time that the Respondent took a contrary view. We would not infer, from the nonresponse, that the Respondent was changing from that clear position. Our colleague says that the fact that the Respondent asked the Union to put in writing its expanding set of demands created a "reasonable expectation on the part of the Union that the Respondent would respond in due course." However, the fact is that the Union's letter was followed up by three phone messages (over 4 months) by the Union to the Respondent. The Respondent did not respond to any of them.

The judge and the dissent rely on *Sterling Nursing Home*, 316 NLRB 413, 416 (1995), to excuse the Union's failure to act on its knowledge of conduct it believed to be unlawful. That reliance is misplaced, as the facts of that case are distinguishable. In *Sterling*, the respondent failed to apply the applicable collective-bargaining agreement to some of the unit employees. When the union learned that certain employees were working outside the bargaining agreement and raised the issue of this alleged noncompliance to the respondent, the respondent made repeated assurances to the union that it was going to "take care of" or "straighten out" the problem of coverage of these employees. Id. at 415. Uncontradicted testimony also established that the respondent promised that it would apply the bargaining agreements to the disputed employees. The judge found that the respondent did not, at any time prior to the union's filing of the charge, demonstrate by clear and unequivocal notice that it had changed its position to the union about remedying the matter. Under these circumstances, the judge concluded, and the Board agreed, that "the Union had no reason to believe that a completed violation had occurred." Id. at 416.

Unlike the circumstances presented in *Sterling*, supra, the Respondent here neither promised to remedy the dispute over coverage of employees in the disputed classifications, nor promised to apply the contract to those employees. Instead, the Respondent never strayed from its assertion that it did not have to apply the contract to the disputed RNs, and it never did. By this conduct, the Respondent gave clear and unequivocal notice to the Union that it was not recognizing the Union as the bargaining representative of the disputed RNs and that it was unwilling to apply the contract to them. Unlike the union in *Sterling*, the Union here thus had reason to believe that a "completed violation" had occurred. *Sterling*, supra at 416.

The dissent asserts that the Respondent gave conflicting signals to the Union that preclude a finding that the Respondent gave clear and unequivocal notice of repudiation. We disagree. In July 1997, when the Union made its first demand for recognition, the Respondent was not recognizing the Union as the collective-bargaining representative of the disputed RNs and was not applying the contract to them. This same set of facts applied in October 1997, January 1998, June 1998, and the day the Union filed a charge in December 1998. Regardless of the Respondent's statements to the Union concerning its "initial thinking" or a "package deal," these same basic facts never changed from the time the Union learned of the Respondent's failure to apply the contract to the day 17 months later when the Union finally filed a charge. Everything the Union knew to file a charge on December 21, 1998, it knew at least 6 months beforehand.

Allowing these discussions to sub silentio toll the limitations period is inconsistent with the policies underlying Section 10(b), which is intended to "promote . . . stable collective-bargaining relationships by precluding extended periods of uncertainty regarding the validity of

[8] As the judge noted in his decision, the Respondent's position to exclude the PCCs from the unit "remained adamant" throughout.

the agreement and the parties' contractual obligations." *A&L Underground*, supra at 469. To hold that there is a tolling would discourage the acting party from discussing with the other party a possible resolution of the issue. That result is contrary to the Act's purpose of fostering settlements of disputes. Furthermore, it is common in Federal court litigation for parties to enter into agreements tolling the running of any statute of limitations "to provide breathing room in which to conduct settlement negotiations." *Hunter-Boykin v. George Washington University*, 132 F.3d 77, 78 (D.C. Cir. 1998). The mere fact that settlement negotiations are ongoing is insufficient to toll the statute of limitations. *Michals v. Baxter Healthcare Corp.*, 289 F.3d 402, 409 (6th Cir. 2002), cert. denied 537 U.S. 944 (2002). See also *Librizzi v. Children's Memorial Medical Center*, 134 F.3d 1302, 1307 (7th Cir. 1998) (plaintiff's "multiple unrequited demands do not provide additional time to start a suit"); *Melhorn v. Amrep Corp.*, 373 F.Supp. 1378, 1382 (M.D. Pa. 1974) (informal settlement negotiations did not toll statute of limitations where not in exchange for plaintiffs' forbearance to sue; "plaintiffs were not wrongfully induced to delay suit, but rather unwisely held out hope of settlement too long"). Our conclusion that the complaint is barred by Section 10(b) is consistent with this principle as well.[9]

Regardless of whether we look to July 1997 (when the Union first demanded recognition as to four classifications of employees), or to June 2, 1998 (the date of the last meeting between the Union and the Respondent concerning the Union's demand for recognition as to the additional classifications of RNs), our conclusion remains the same: the Union had clear and unequivocal notice of a violation well beyond the 6 months before the Union filed the charge on December 21, 1998. *Leach*, supra.

B. The Respondent's Repudiation of the Contract Outside the 10(b) Period is a Complete Bar to Recovery for the Union

Having determined that the Union had clear and unequivocal notice of the Respondent's refusal to apply the contract to the disputed RNs prior to the 10(b) period, the remaining question is whether the conduct at issue constituted a completed violation or a continuing one. The judge concluded, and the dissent agrees, that even assuming the Union had clear and unequivocal notice of the Respondent's refusal to apply the contract outside the 10(b) period, the Respondent's conduct constituted separate and distinct violations of the Respondent's bargaining obligations, and the Union is thus entitled to a remedy for at least the 6 months prior to the filing of the charge under a continuing violation theory. *Farmingdale Iron Works*, 249 NLRB 98, 99 (1980), enfd. 661 F.2d 910 (2d Cir. 1981). We disagree. Instead, under the circumstances of this case, we conclude that the Respondent's conduct outside the 10(b) period amounted to a repudiation, which is a completed violation of the Act, and thus cannot be treated as a continuing violation.

In *A&L Underground*, 302 NLRB 467 (1991), the parties signed an interim agreement prior to the 10(b) period, and a dispute arose as to whether the agreement applied to more than a single project. By letter to the union, the respondent maintained its stance that it was not bound by the terms of the agreement, and it ceased complying with its terms for well over a year before the union ultimately filed a charge. The Board found that by this letter, the respondent "severed the bargaining relationship in one stroke, and its failure to apply the contract thereafter is little more than the effect of that action." 302 NLRB at 469. Thus, the Board concluded that the respondent totally repudiated the contract and that the 10(b) period began to run when the union received clear and unequivocal notice of that repudiation.

The Board has found that a contract repudiation need not be an express, written repudiation but instead can be manifested by the respondent's conduct. In *Natico, Inc.*, 302 NLRB 668 (1991), for example, the Board found that the respondent's failure to make pension fund payments over an extended period of time was a repudiation of its obligation to make the payments. "The failure to make the payments month after month was itself tantamount to repudiation, and the Union was put on notice of the repudiation by the sheer length of time during which [the respondent employer] consistently failed to make payments." Id. at 671. (Citation and internal quotations omitted.) See also *Park Inn Home for Adults*, 293 NLRB 1082, 1082 (1989) (where respondent stopped pension fund contributions 2 years prior to contract expiration, union was on notice of repudiation of obligation to make contributions).

These cases stand for the proposition that when an employer consistently fails to recognize the union or to abide by the terms of a collective-bargaining agreement, the union is put on notice that the employer has repudiated the agreement, thus triggering the commencement of the 10(b) period for filing a charge. We find that the Respondent's conduct here falls within this line of

[9] Contrary to the dissent, there is no inconsistency between our finding that the Union had clear and unequivocal notice of the contract repudiation, notwithstanding the parties' subsequent negotiations, and our conclusion that those negotiations also did not effect a tolling of the 10(b) period. As the cases cited above make clear, the fact that settlement negotiations are underway does not affect the running of a statute of limitations.

cases.[10] The Respondent's refusal to apply *any* part of the contract to *any* of the disputed RNs[11] at *any* time since the Respondent entered into a collective-bargaining relationship with the Union in 1991 constituted a total repudiation of the entire contract as to these employees.[12] The policy concerns that informed the Board's decision to reject the continuing violation theory as inapplicable to a "clear and total contract repudiation" in *A&L Underground* apply equally here. *A&L Underground*, supra at 468. First, "[i]t is hardly in the real interest of the party desiring continued enforcement of the contract to allow the repudiating party to ignore the agreement indefinitely without being brought to book." Id. Application of the continuing violation rule under these circumstances fosters uncertainty and instability in the collective-bargaining relationship in the long run. Second, application of a continuing violation rule will always impair the process for adjudicating charges by permitting litigation over distant events. Id.

As discussed above, it is undisputed that the Union had actual knowledge of the Respondent's refusal to apply the contract by at least July 1997 with respect to the first four classifications of disputed RNs for which it sought recognition, and by June 2, 1998, with respect to the remaining disputed RNs. The Union's failure to act on this clear and unequivocal notice of contract repudiation precludes our tolling of the 10(b) limitations period under *A&L Underground* and its progeny.

The dissent contends that the Respondent only engaged in "selective repudiation" and that its actions amounted to a material breach. We disagree. There is nothing selective at all about the Respondent's refusal to apply the contract to the disputed RNs. The Union demanded recognition as the collective-bargaining representative for those RNs, and the Respondent refused. The Respondent has never applied a single provision of the contract to any of them. Additionally, the Respondent has never denied that it refused this recognition and failed to apply the contract, despite the fact that the contract arguably covers these RNs. Thus, the record amply supports our finding that the Respondent repudiated the contract as to these RNs.

In sum, the contract was repudiated as to the disputed classifications. The distinction drawn by the Board is between contract breach (a party erroneously interprets a contract term) and contract repudiation (a party refuses to apply the contract). The instant case involves the latter conduct, albeit limited to certain classifications.

We also disagree with the dissent that the Respondent's correspondence and negotiations with the Union should be viewed as conduct inconsistent with the Respondent's clear and unequivocal acts of repudiation. See, e.g., *Park Inn Home for Adults*, supra (negotiations between the parties following company's repudiation offered "no clear evidence that [the company] in fact ever acknowledged a continuing obligation to [comply with the contract]"); *Natico, Inc.*, supra (employer's post-repudiation negotiations and "noncommittal remarks" were not inconsistent with repudiation). Again, long before the Union filed a charge, the Respondent did not apply a single provision of the contract to the disputed RNs and openly stated that it was not obligated to do so. This is repudiation.

C. Conclusion

Because the unfair labor practice charge was filed on December 21, 1998, and because the Union had clear and unequivocal notice of a completed violation of the Act as early as July 1997 and no later than June 2, 1998, we conclude that the complaint is time barred under Section 10(b) of the Act. Therefore, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER WALSH, dissenting.

Reversing the well-reasoned decision of the judge, the majority concludes that the complaint is time-barred by Section 10(b) of the Act. This conclusion is based on the majority's dual findings that (1) the Union had clear and unequivocal notice, outside the 10(b) period, of the Respondent's failure to recognize the Union as the bargaining representative of certain classifications of registered nurses (RNs) and to apply the contract terms to them; and (2) the Respondent's conduct amounted to a full repudiation of the contract, rather than a breach of its terms. The majority's two key factual findings are erroneous and, consequently, so, too, is its ultimate conclusion.

The judge correctly rejected the Respondent's 10(b) defense because the Union did not have clear and un-

[10] The complaint alleges that the Respondent did not recognize the Union as the bargaining agent of the disputed classifications of RNs, and the Respondent answered that the disputed RNs were never part of the bargaining unit. The dissent is thus incorrect that the pleadings do not raise a theory of repudiation.

[11] As the dissent points out, the Respondent did apply the contract to a single radiology nurse, Myrna Lao, for some time. Lao had become a bargaining unit member while working as an RN in a different department covered by the unit. While the Respondent inadvertently allowed this nurse to stay within the unit when she transferred into the Radiology department, the Respondent at all times maintained to the Union that neither this nurse, nor any other radiology RN, belonged in the unit.

[12] Nothing in the repudiation line of cases dictates the dissent's apparent finding that a repudiation of contract can only occur when a respondent does not apply a contract to any employees.

equivocal notice of a violation outside the 10(b) period. Further, the judge correctly found that even assuming the Union had such notice, the Respondent's conduct in failing to recognize the Union as the representative of the disputed RNs and in failing to apply the existing contract to them resulted in a series of separate and distinct violations for which the Union is entitled to a remedy that encompasses the 6 months prior to the date the Union filed its charge.

I. FACTS

The Respondent and the Union have had four successive collective-bargaining agreements since November 1, 1991, and each of these agreements contained the identical recognition language as follows:

> The Employer recognizes the Union as the sole and exclusive collective bargaining representative of **all full-time and regular part-time registered nurses** and graduate nurses, including charge nurses and IV therapists employed by the employer at its Livingston, New Jersey facility, but excluding all office clerical employees, graduate practical nurses and licensed practical nurses, infection control employees, utilization review employees, home health care coordinators, in-service instructors, computer coordinators, nutrition specialists, anesthesiology coordinators, other professional and nonprofessional employees, other technical employees, service and maintenance employees, engineers, managerial employees, nursing coordinators, temporary employees, guards and supervisors, including head nurses and radiology nurse specialists, as defined in the Act, and all other employees. [Emphasis added.][1]

It was during the term of the parties' 1996–1998 collective-bargaining agreement that the Union filed its charge, on December 21, 1998.

In or about 1989, the Respondent created a new "Patient Care Coordinator" (PCC) position. When the Union learned, some time in the mid-1990s, that one or more of the PCCs were performing bargaining unit work, it sought information from the Respondent on the position. By letter dated August 9, 1994, Union Co-chair Karen May requested that the Respondent provide the Union with a PCC job description. When the Respondent failed to reply, Union Executive Director Sondra Clark followed up on the request by memo dated February 3, 1995. In this request to the Respondent's human resources director, Martin Marino, Clark additionally requested the names and assignments of the PCCs. When the Respondent again failed to respond, Clark again reiterated the Union's request by memo dated March 20, 1995.

It was not until April 1995—8 months after the Union's initial request for information—that the Respondent ultimately refused the Union's information request. Upon receiving this response, the Union promptly filed an unfair labor practice charge on April 5, 1995, alleging that the Respondent's refusal to provide the requested information violated Section 8(a)(5) of the Act.[2]

Between the months of March and July 1997, the Union learned that the Respondent was employing nonsupervisory RNs in the radiology,[3] employee health, and cardiac catheterization laboratory departments. By memo dated July 8, 1997, and received by the Respondent on August 12, 1997, the Union made a formal demand for recognition for the PCCs, radiology RNs, employee health unit RNs, and cardiac catheterization RNs.

The parties met in October 1997 and again in January 1998 to discuss the Union's demand. At the October 1997 meeting, Marino presented what he termed his "initial thinking" on each of the employee categories to Clark and May. During these discussions, Marino told the Union that he would have to gather additional information concerning the PCC position. He also represented to the Union that a "package deal" could be worked out, whereby the nonsupervisory RNs in the Radiology department would be included within the bargaining unit. Marino conditioned this proposal on agreement by the Union that all the disputed classifications would have to be discussed and agreed upon before any action would be taken by the Respondent. Otherwise, Marino told the Union, the matter would have to be resolved by the Board. The Union rejected this proposal.

The parties again met, at Marino's request,[4] in January 1998. At this meeting, Marino reiterated the Respondent's willingness to include all nonsupervisory radiology RNs in the unit as part of a package deal. As to the PCCs, Marino represented to the Union that the issue of PCC RNs taking patient assignments while not enjoying the benefits of the contract would be "cleaned up." Additionally, at the end of this meeting, Marino presented a new proposal to the Union: if it agreed to withdraw its

[1] According to the plain language of this Board-certified bargaining unit, none of the disputed classifications of RNs at issue in this case—employee health RNs, cardiac catheterization lab RNs, case manager RNs, radiology RNs, pediatric oncology outpatient clinic RNs, or pediatric clinic RNs—is named under the exclusions stipulated to by the parties.

[2] This charge was ultimately resolved by a non-Board settlement in which the Respondent provided the requested information to the Union.

[4] By letter dated December 23, 1997, Marino acknowledged to Clark: "I agreed to look into a number of the additional issues you and Karen [May] raised," and suggested meeting again in January "so that we can continue this dialogue on this matter" and to "continue our efforts to resolve this matter internally directly between the parties."

pending Board charge concerning the PCCs, the Respondent would concede, in addition to the radiology RNs, that the cardiac catheterization lab RNs were also part of the bargaining unit. As before, Marino conditioned this proposal on the Union's willingness to resolve the coverage issues as to all of the disputed positions at once. The Union again rejected Marino's proposal.

In February 1998, the Union learned that the Respondent was recruiting RNs to the position of case manager. Later that year, in June 1998, the Union further learned that there were nonsupervisory RNs working in the pediatric oncology outpatient clinic, as well as a single RN working in the pediatric clinic.

The parties met once again on June 2, 1998. At this meeting, the Union communicated to Marino that it intended to broaden its earlier demand for recognition to include the additional classifications of case managers, pediatric oncology RNs, and the pediatric clinic RN position of which it had recently become aware. In response, Marino asked the Union to submit a "fresh list" of RN classifications for which the Union sought recognition. By memo dated June 3, 1998, the Union submitted its list to the Respondent, seeking recognition of a total of 14 classifications. On July 6, Clark left a telephone message for Marino to set up a meeting to discuss the Union's latest demand. Marino did not respond. On August 10, 1998, Clark called Marino again, and left a similar message, but again, Marino did not respond. On October 21, Clark left a third and final message for Marino seeking followup to their previous meeting, but to no avail.

On December 21, 1998—less than 3 months after the last contact made by the Union to the Respondent in October 1998—the Union filed a charge alleging, inter alia, that the Respondent's refusal to bargain collectively and in good faith with the Union over the disputed classifications violated Section 8(a)(5) and (1) of the Act. In asserting the affirmative defense of Section 10(b), the Respondent did not contend that it had repudiated the contract.

II. ANALYSIS

"Although Section 10(b) bars a complaint based on unlawful conduct occurring more than 6 months before the filing and service of the charge, the Board has consistently held that the 10(b) period does not commence until the charging party has 'clear and unequivocal notice' of the violation." *Vallow Floor Coverings, Inc.*, 335 NLRB 20, 20 (2001). "[T]he burden of showing that the Charging Party was on clear and unequivocal notice of the violation rests on the Respondent." *A&L Underground*, 302 NLRB 467, 469 (1991). Where a "delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct," a finding of clear and unequivocal notice is unwarranted. Id.

Board precedent has long distinguished between "a simple failure to abide by the terms of a collective-bargaining agreement," or "material breach violation," on one hand, and "an outright repudiation of the agreement itself," or "total repudiation" on the other. *Vallow Floor,* supra (citing *A&L Underground*, supra). In the latter situation, when an employer completely repudiates the contract, the unfair labor practice is committed at the moment of the repudiation, and the 10(b) period commences once the union has clear and unequivocal notice of the act of repudiation. Under these circumstances, any subsequent refusals by an employer to honor the terms of the collective-bargaining agreement do not constitute unfair labor practices; rather, these acts are simply the consequences of the respondent's clear and unequivocal act of repudiation. For this reason, the union must file its charge within 6 months upon receiving notice of the repudiation, or a complaint based on that conduct will be time barred. Id.

When an employer has not rejected a collective-bargaining agreement in its entirety, but has instead refused to apply one or more of its provisions to unit employees, this scenario presents a breach of the contract's terms. Under these circumstances, each successive breach of the contract terms constitutes a separate and distinct unfair labor practice. Id. It is for this reason that even when a union has clear and unequivocal notice outside the 10(b) period that the respondent is failing to observe the terms of the contract, the complaint would not be time-barred. Instead, the 10(b) period would serve only as a limitation on the remedy to the 6 months prior to the filing of the unfair labor practice charge. Id; *Farmingdale Iron Works*, 249 NLRB 98, 99 (1980), enfd. 661 F.2d 910 (2d Cir. 1981).

Here, the Union did not receive clear and unequivocal notice outside the 10(b) period that the Respondent would not apply the contract to employees in the disputed classifications, and thus, the instant unfair labor practice charge was timely filed. Furthermore, even assuming the Union received such notice, the Respondent's conduct amounted to a breach of contract, not a repudiation of contract. Consequently, the complaint is not time barred, and a violation of Section 8(a)(5) may be found based on the Respondent's failure to apply the contract during the 6 months prior to the filing of the charge.

A. The Union did not have Clear and Unequivocal Notice of the Respondent's Rejection of the Union's Demand

The judge correctly found that at the time the Union filed its charge, the Respondent had failed to unequivo-

cally reject the Union's demand for recognition of the disputed classifications of RNs, the terms of which the Union first presented to the Respondent in July 1997, and over which the Union and Respondent continued to negotiate through June 3, 1998. A brief review of the undisputed facts shows support for this finding.

Fundamentally, the Respondent does not dispute that the parties had been engaging in a series of settlement negotiations[5] since July 1997, when the Union made its first formal demand for recognition. Nor does the Respondent deny that it sought a "fresh list" of classifications in the final June 2 meeting, which the Union provided the following day. Further, the Respondent admits that it failed to respond to the June 3 list that it had requested from the Union and that it failed to return any of the phone calls from the Union from July to October. Objectively speaking, the Respondent's June 2 request for a list of disputed classifications created a reasonable expectation on the part of the Union that the Respondent would respond in due course to the information it requested.[6] The Respondent's failure to do so is, of course, highly relevant to the question of notice. As the judge correctly found, it is the reason the Union did not have clear and unequivocal notice of the Respondent's rejection of its demand within the 10(b) period.

Notwithstanding all of these undisputed facts—particularly the fact that it was the Respondent that affirmatively requested from the Union a "fresh list" of disputed classifications on June 2, 1998—the majority finds that the Union had clear and unequivocal notice of a violation. The majority's failure to take the Respondent's "conflicting signals" and "ambiguous conduct" into account in determining the date by which the Union received clear and unequivocal notice of the violation is contrary to both the record evidence[7] and case law that cautions otherwise. *A&L Underground,* supra, 302 NLRB at 469.

Indeed, the judge properly analogized the instant case to that of *Sterling Nursing Home*, 316 NLRB 413 (1995). In *Sterling*, as here, the respondent failed to apply the existing collective-bargaining agreement to a discrete group of unit employees under circumstances that the judge found did not give the union clear and unequivocal notice, within the 10(b) period, of a completed violation. Id. at 416. The factual distinctions that the majority portrays between the two cases are superficially drawn. It is true, as the majority points out, that unlike the employer in *Sterling*, the Respondent here did not tell the Union that it would "take care of" the problem of coverage of the disputed employees. Id. The Respondent did, however, engage in settlement discussions with the Union for a period of several months, signaling, by its own admission, an attempt to resolve the matter short of the Union having to resort to the Board. Notwithstanding the majority's apparent finding to the contrary, Marino's offer of a "package deal" to the Union in successive meetings in 1997 and 1998 is evidence that the Respondent was telegraphing to the Union the possibility that it would recognize the Union as the representative of employees in the disputed classifications and apply the contract to them.[8] As the judge implicitly found, this conduct on behalf of the Respondent is analogous to the respondent's willingness, in *Sterling*, to "remedy the matter."[9] Surely, it was the representations of the employer that it

[5] The Respondent's assertion that these ongoing negotiations were "simply a repeated insistence by management that the status quo [of excluding the disputed classifications of RNs] would remain" is not supported by the record. It is also inconsistent with the Respondent's own characterization of "Marino's conditional willingness" to *include* certain RNs during these meetings. (R. Br. at 13, fn. 2.)

[6] The majority asserts that I read "too much into the Respondent's nonresponse to the Union's letter of June 3," which provided the list requested by the Respondent on June 2. However, the majority's circular reasoning reads far more into this nonresponse than I do by asserting that it negates the reasonableness of the expectation of a response.

[7] In finding that the Union had clear and unequivocal notice as of its July 1997 demand by reasoning that the "same set of facts applied in October 1997, January 1998, June 1998, and the day the Union filed a charge in December 1998," the majority does not account for the undisputed evidence that in December 1997, Marino was representing to the Union the Respondent's desire to "continue this dialogue on this matter" and "continue our efforts to resolve this matter internally and directly between the parties." Such express language, in addition to the subsequent oral representations by Marino that the Respondent was interested in a "package deal" in which the Respondent would agree to coverage of the radiology RNs, the cardiac catheterization Lab RNs, and possibly others (hence the June 3 request for a "fresh list" of classifications), evidences the Respondent's willingness to concede coverage of some of the disputed RNs. Thus, at the very least, the Respondent indicated to the Union that it was considering alternatives to its initial position. That the Respondent's position ultimately remained unchanged does not render its exploration of alternatives a sham. In short, so long as the Respondent indicated to the Union that it wanted to engage in a dialogue and that it was considering the possibility of recognizing some of the disputed RN classifications, its conduct thereby precluded a finding of clear and unequivocal notice of a "completed violation" of the Act, regardless of whether the Respondent, in the end, acted on any of the alternatives it had been considering all those many months.

[8] For example, on behalf of the Respondent, Marino offered coverage of all radiology RNs in the October 1997 meeting. He then represented at the January 1998 meeting that the issue of coverage as to the PCCs would be "cleaned up," and additionally suggested coverage of the cardiac catheterization RNs at that time.

[9] As evidence of the Respondent's resolve never to cover certain of the disputed RNs, the majority emphasizes that Marino conditioned resolution of the recognition demand as to any of the disputed RN classifications upon the Union's agreement as to all of them. While the majority interprets this position as signaling an unconditional unwillingness by the Respondent to cover some of the disputed RNs, the flip side of this position is, of course, that the Respondent was willing to cover at least some of the disputed RNs.

was acting in good faith towards settling its dispute with the union that mattered to the Board in *Sterling*, and not the magic words uttered by the employer in that case.

The majority also asserts that the Union acted at its own peril by not filing the charge at the time Marino communicated the Respondent's "package deal" proposals to the Union. However, this trivializes the Union's good-faith attempts to resolve the issues raised by its demand for recognition of the disputed RNs, as well as the Respondent's willingness to engage the Union in settlement negotiations at that time. It also trivializes Board policy that encourages parties to attempt to settle their disputes within the framework of collective bargaining and without resort to the Board.[10] See *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (Federal policy is to promote industrial stabilization through the collective-bargaining agreement). See also *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).[11] Finally, there can be no dispute that the Respondent was sending mixed messages to the Union by seeking a "fresh list" of classifications from the Union on June 2, only to then withhold any response to the Union for an indefinite period thereafter. Based on this ambiguous conduct of the Respondent, it was reasonable for the judge to find that the matter of whether the Respondent would recognize the Union as the representative of the disputed classifications of RNs at the time the Union filed its charge in December 1998 was left "as a whole unresolved." It was thus also reasonable for the judge to conclude that the Respondent did not satisfy its burden of showing that the Union had clear and unequivocal notice prior to the 10(b) period that the Respondent was no longer willing to negotiate the subject of the disputed RNs. Accordingly, the Union timely filed its charge in December 1998—less than 3 months after the Union's last attempt to elicit a response from the Respondent.

B. The Respondent's Conduct in Refusing to Apply the Contract Terms to Some Unit Employees Constituted Repeated Breaches of the Contract, not a Repudiation of the Contract

Even assuming clear and unequivocal notice, the majority is still wrong to conclude that the Respondent's conduct in failing to apply the contract terms to the disputed classifications of unit employees amounted to a contract repudiation, rather than repeated breaches of the contract's terms. The majority's conclusion is not supported by the actual position of the Respondent or Board precedent.

First, when the Respondent asserted the 10(b) affirmative defense, it did not argue a theory of contract repudiation at the hearing, in its exceptions, or anywhere in its briefs submitted to the judge or to the Board. This theory upon which the majority bases its conclusion to deny relief to the Union is thus not properly before the Board for consideration. *Avne Systems, Inc.*, 331 NLRB 1352, 1354 (2000) (Board majority refused to consider arguments made by a dissenting Board Member that were not made by the respondent in the exceptions it filed to the judge's decision).

Second, the majority's assertion that the Respondent's conduct constituted a repudiation of the conduct rather than breaches of the contract is based on cases that are inapposite. In *A&L*, the Respondent repudiated the entire contract outside the 10(b) period. *A&L Underground*, supra, 302 NLRB at 467–468. *Natico, Inc.*, 302 NLRB 668 (1991), and *Park Inn Home for Adults*, 293 NLRB 1083 (1989), are even further wide of the mark. In each of those cases, the Board was barred from finding a violation under the *Farmingdale* "repeated breaches" theory because the unfair labor practice charge was filed more than 6 months after the expiration of the applicable col-

[10] The majority's assertion that "[t]o hold that there is a tolling would discourage the acting party from discussing with the other party a possible resolution of the issue" flatly contradicts the majority's adamant position in this case that the Respondent's settlement discussions with the Union did not evidence the Respondent's intent towards "a possible resolution of the issue," and that the Respondent, therefore, had given clear and unequivocal notice to the Union that it was repudiating the contract both before and during these discussions.

[11] The "federal court litigation" cases cited by the majority are totally inapposite. In *Hunter-Boykin v. George Washington University*, 132 F.3d 77 (D.C. Cir. 1998), the court of appeals reversed the lower court's grant of summary judgment and reinstated the plaintiff's complaint because the interpretation of the phrase "to toll the running of any statute of limitations period," as used in a letter agreement between the plaintiff and the defendant, presented issues of material fact that precluded judgment as a matter of law. In the three other cases cited by the majority, there was no connection between settlement negotiations and the issue of whether a violation of law had occurred. *Michals v. Baxter Healthcare Corp.*, 289 F.3d 402 (6th Cir. 2002), cert. denied 537 U.S. 944 (2002), involved a claim for injury as a result of breast implants manufactured by the defendants; *Librizzi v. Children's Memorial Medical Center*, 134 F.3d 1302 (7th Cir. 1998), involved an alleged breach of fiduciary duty; and *Melhorn v. Amrep Corp.*, 373 F. Supp 1378 (M.D. Pa. 1974), involved an allegedly fraudulent land sale. It was neither argued nor found that the settlement negotiations had any bearing on whether there was an injury due to breast implants, a breach of fiduciary duty, or a fraudulent land sale. In each case, the violation was essentially assumed, and the question was whether the defendants' involvement in settlement negotiations either waived or estopped a statute of limitations defense.

Here, the violation turns on whether the Respondent gave clear and unequivocal notice to the Union that it would not apply the contract to the disputed RNs. In sharp contrast to the cases cited by the majority, the Respondent's settlement discussions in this case, which explored alternatives to refusing coverage to the disputed RNs, have direct bearing on whether such notice was given.

lective-bargaining agreement initially creating the allegedly breached obligation.

Here, by contrast, the Respondent did not repudiate the entire agreement, and the Union's charge was filed during its term. Even under the most generous characterization of the facts, the Respondent's conduct constituted a partial or selective repudiation of the contract at best, as it is undisputed that the Respondent applied the contract terms to some RN unit employees but not others. Contrary to the majority, conduct amounting to a partial repudiation of a contract does not constitute a "total repudiation" or "completed violation" of the Act. It does not amount to a "repudiation" at all.[12] Instead, as the judge found, the application of terms of an existing contract to some unit employees but not others results in a series of breaches of the collective-bargaining agreement. *Vallow Floor Coverings, Inc.*, 335 NLRB 20 (2001). See also *Farmingdale*, supra. The judge thus properly analyzed the instant case within the framework of *Sterling*, supra, in which the Board reiterated that failure to apply significant provisions of a collective-bargaining agreement to unit employees amounts to a breach of the contract and not a contract repudiation. 316 NLRB at 416. Indeed, in *Sterling*, the judge specifically rejected the respondent's attempts to analogize a refusal to apply contract terms to a discrete group of unit employees to a contract repudiation. The judge said, and the Board agreed, that cases involving *repudiations of entire agreements* (or significant contract provisions, or an already expired agreement) are inapposite to situations like the one presented in *Sterling,* where the respondent had been applying the contract terms to some unit employees yet refused to apply those same terms to other unit employees. Id. Likewise, the Respondent here has applied the terms of the collective-bargaining agreement to some unit employees but not to the disputed classifications of unit employees

C. Conclusion

The Respondent's conduct in sending mixed messages to the Union—from its assertions that it would "continue dialogue" on the matter of the disputed classifications to its offer of "package deals" at various points between July 1997 and June 1998—absolutely precludes a finding of clear and unequivocal notice in this case. Furthermore, even assuming that the Union had clear and unequivocal notice, under longstanding Board precedent, the Respondent's conduct constituted a breach of the contract's terms, and not a repudiation of the contract. The majority's conclusion that the complaint is time barred is thus wrong as a matter of fact and law.

[12] The majority does not point to a single case in which the Board or a court has found a partial repudiation to constitute a "completed violation" of the Act.

Tara Levy, Esq., for the General Counsel.
Frank Mastro, Esq. and *Maurice Nelligan, Esq. (Apruzzese, McDermott, Mastro & Murphy),* of Liberty Corner, New Jersey, for the Respondent.
Adrienne Saldana, Esq. (Spivak, Lipton, Watanabe, Spivak & Moss), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. On the basis of a charge filed by New Jersey Nurses Union, affiliated with the Communication Workers of America, AFL–CIO as Local 1091 (the Union) on December 21, 1998, against Saint Barnabas Medical Center (the Respondent or the Hospital), a complaint and notice of hearing was issued on August 5, 1999, alleging that the Respondent has been engaging in certain unfair labor practices as set forth in the National Labor Relations Act (the Act), by failing to recognize the Union as the representative of certain registered nurses (RNs) the Respondent has failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act.[1] By answer timely filed the Respondent denied the material allegations in the complaint and raised several affirmative defenses.

A hearing in this matter was held before me in Newark, New Jersey, between February 25 and March 28, 2002. Subsequent to the closing of the case, the General Counsel and the Respondent filed briefs.[2]

On the entire record and the briefs of the parties, and on my observation of the witnesses, I make the following

FINDING OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent has maintained a hospital including offices in Livingston, New Jersey, where it delivers health care services. During the 12-month period ending in December 1998, the Respondent, in conducting its business operations, derived gross revenues in excess of $250,000, and purchased and received at its Livingston facility products, goods, and materials valued in excess of $5000 directly from points outside the State of New Jersey. The complaint alleges, the Respondent admits,

[1] The parties having reached an agreement providing for the satisfactory adjustment of the issues raised by the charges regarding the Union Hospital Cancer Center nurses, and the Union having requested withdrawal of the charge insofar as it concerns the Union Hospital Cancer Center nurses, by order dated November 28, 2001, the Regional Director for Region 22, dismissed the allegations in the complaint pertaining to the Union Hospital Cancer Center and approved the request to partially withdraw the charge in this case.

[2] Certain errors of the transcript are noted and corrected.

As regards the Respondent's motion to expunge a comment made by its counsel, Tr. 625, L. 22, "not intended for publication," there being no opposition thereto, I hereby grant the motion to expunge this statement from the record.

and I find that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent admits, and I find that the Union, at all material times, has been a labor organization within the meaning of Section 2(5) of the Act. The complaint also alleges and I find that the following employees of the Respondent (the unit) constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[3]

> All full-time and regular part-time registered nurses and graduate nurses, including charge nurses and IV therapists, employed by the Employer at its Livingston, New Jersey facility, but excluding all office clerical employees, graduate practical nurses and licensed practical nurses, infection control employees, utilization review employees, home health care coordinators, in-service instructors, nursing instructors, computer coordinators, nutrition specialists, anesthesiology coordinators, other professional and non-professional employees, other technical employees, service and maintenance employees, engineers, managerial employees, nursing coordinators, temporary employees, guards and supervisors, including head nurses and radiology nurse specialists, as defined in the Act, and all other employees.

The complaint alleges, the Respondent admits, and I find that on or about August 12, 1991, the Union was certified as the exclusive collective-bargaining representative of the unit. Since then the Respondent has recognized the Union as the collective-bargaining representative of the unit employees and this recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from November 2, 1999, to November 1, 2002. Karen May, the Union's labor representative since 1995 monitors the Hospital's compliance with the collective-bargaining agreement between the parties.[4]

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Evidence

Saint Barnabas Medical Center is a single facility acute care hospital with six floors containing 600 to 620 beds. The Union represents approximately 850 nurses and 40 licensed practical nurses who work in about 36 patient care units, with 15 to 80 RNs assigned to a nursing unit. Veronica Geissler, director of patient care services testified that there are about 200 other RNs working at the hospital, including administrative and supervisory employees who are not members of the bargaining unit.

The disputed nurses are RNs working: (1) as patient care coordinators; (2) in the radiology department, also referred to as the X-ray department; (3) in the employee health area; (4) in the cardiac catheterization laboratory; (5) as case managers; (6) in the Pediatric Clinic or the Pediatric Health Center; (7) in the Pediatric Oncology Outpatient Clinic (Valery Clinic).

The Patient Care Coordinators

In or about 1989, the Respondent established the position of patient care coordinator (PCC) in the nursing department. Geissler testified that the function of the PCC RNs was to assist the nurse manager in running the nursing unit, supervising the staff, and assuring quality patient care. In 1994, the Union received information from one of its members that a PCC was performing "charge nurse" duties.[5] It is undisputed that charge nurses are included within the collective-bargaining unit.

By letter dated August 9, 1994, Union Co-chair Karen May asked the Hospital to provide the Union with a job description for the PCC. When the Hospital failed to provide the requested information, Union Executive Director Sondra Clark renewed the request by memorandum dated February 3, 1995, adding therein a request for the names and assignments of the PCCs, and complaining that the Hospital was improperly assigning a PCC named Eileen O'Rourke direct patient care responsibilities. When the Hospital failed to respond to the Union's requests, the Union reiterated its request for the PCC job descriptions by memorandum dated March 30, 1995.

The Hospital advised the Union, by letter dated April 3, 1995, that it would not provide the job description, and names and assignments of the PCCs requested by the Union since this information involves "personnel who are not part of the bargaining unit represented by NJNU." Additionally, the Hospital denied that it had assigned a full patient care assignment to O'Rourke who "has been fully functioning in her management role" as a PCC, "unless a staffing shortage develops and her assistance is required." The Union then filed an unfair labor practice charge on April 5, 1995, alleging that the Hospital's refusal to provide the requested information violated Section 8(a)(5) of the Act. After the issuance of a complaint by the Region on August 28, 1997, the Hospital, by letter dated March 27, 1998, provided the Union with the job description of the PCCs. By letter dated August 29, 1999, as part of the settlement of the unfair labor practice complaint, the Hospital provided the Union with the names of the PCCs and the units to which they were assigned.

In about April 1997, Union Representative May received information from one of the union delegates that in the Hospital's telemetry or "5700" unit, the Hospital had assigned one PCC to perform charge nurse duties full time and another PCC to spend all of her time on patient care. May testified that direct patient care is bargaining unit work. Moreover, Veronica Geissler, a witness for the Respondent, testified that since at least 1995, PCCs provided direct patient care as part of their function in

[3] The Respondent notes in its answer that the unit described in "paragraph 6 of the Complaint" is the unit currently recognized by the Respondent and embodied in the collective-bargaining agreement between the Respondent and the New Jersey Nurses Union (NJNU).

[4] The Union's principal officers are its co-chairs. Sondra Clark held the position of executive director of the Union from 1990 to 2001. May was a union co-chair from 1991 to 1996.

[5] "Charge nurses" assign other RNs, who are referred to as "staff RNs" to patients, assign staff RNs lunchtime and breaktime and perform other oversight duties.

delivering quality care to patients and "just not to—manage and supervise."[6]

Radiology RNs

The radiology or X-ray department employees perform diagnostic testing, including CAT scans, ultra sound, MRI tests, and X-rays, on patients. Approximately 300 patients are tested each day. May testified that prior to 1997, the Union was aware of only one RN working in the radiology department, Myrna Lao, who was a member of the bargaining unit. In about March 1997 Lao raised an issue about her work schedule to May who now for the first time learned that there were other RNs working in the radiology department alongside Lao and while these other radiology RNs were performing duties similar to those performed by Lao, the Hospital did not consider these RNs to be in the bargaining unit. Lao reported to May that there were three RNs working in radiology beside herself.

During the hearing, the Hospital did not rebut the Union's evidence that the duties of all the radiology RNs were essentially similar. Also, the parties stipulated that between November 1991 and December 1998, the Respondent employed nonsupervisory RNs in its radiology department and excluded them from the collective-bargaining unit represented by the Union.[7]

Employee Health RNs

Prior to 1997, it was the Union's belief that the Hospital employed only a supervisory RN in the employee health department. When in April 1997, a union delegate visited the Employee health department after being injured at work, she noticed that there was more than one RN working in the employee health area. When the union delegate told Union Representative May about this, May concluded that there were RNs working in the employee health department who should be included in the collective-bargaining unit. The parties stipulated that at times between November 1991 and December 1998, the Respondent employed nonsupervisory RNs in its employee health department and failed to include them in the bargaining unit represented by the Union.

Cardiac Cauterization RNs

In the Hospital's cardiac catheterization unit, the condition of a patient's heart is tested by a doctor using a catheter inserted into a heart's vein, and by flouroscopy. Between 1974 and 1980, prior to the Union's collective-bargaining relationship with the Respondent, the Hospital employed RNs in the cardiac cauterization laboratory. In about August 1997, the Union first learned that there were RNs working in that unit who were not in the bargaining unit. It was stipulated by the parties that between November 1991 and December 1998, the Hospital employed nonsupervisory RNs in the cardiac catheterization area and failed to include them in the collective-bargaining unit represented by the Union. At the hearing, Frank Soldo, clinical director of the cardiac catheterization laboratory, an RN and testifying as a witness for the Respondent, related that, at present, there are 13 RNs working in the cardiac catheterization area, and 4 cardiovascular technologists, 2 technical assistants, 2 department secretaries, an inventory manager, and a cauterization lab coordinator.

Case Managers

Prior to February 1998 the Union was unaware of a position at the Hospital entitled case manager. However, on about February 26, 1998, Karen May learned that the Respondent was recruiting RNs to be case managers when she saw a posted flier at the Hospital stating "RNs, Are you interested in a career change? Have you thought about Case Management?" By memorandum dated February 26, 1998, the Union requested information about the case managers, including a job description, the number of positions the Hospital was seeking to fill, and whether an RN degree was required for the position. When the Hospital failed to reply the Union followed its request for information by another memorandum dated April 27, 1998. On May 25, 1998, the Hospital's director of human resources, Martin J. Marino, contacted the Union and asked for more time to respond to the Union's request for information on case managers. The Respondent has never supplied the Union with the requested information on case managers.

The parties stipulated that during at least the period from 1997 through December 1998, the Hospital employed nonsupervisory RNs as case managers and did not include them in the collective-bargaining unit represented by the Union. The Respondent's witness, Susan Sorge, manager of the case management department, testified that the Hospital began employing RNs as case managers in 1998. The Hospital requires Case managers to be RNs. Sorge stated that at present there are 31 case managers all of whom are RNs.

Pediatric Oncology Outpatient Clinic RNs

The Pediatric Oncology Outpatient Clinic (also Valery Clinic or Center) is an outpatient facility for children with cancer and serious blood disorders. It was stipulated by the parties that during at least the period from 1997 through December 1998, the Respondent employed nonsupervisory RNs in the Valery Clinic, and did not include them in the collective-bargaining unit represented by the Union. Jamie Cappuccino, nurse manager of the Valery Center and advance practice nurse, a witness for the Respondent testified that in about 1997, the Hospital hired two RNs to work in the Valery Clinic as advanced practice RNs and one RN as nurse clinician. Sometime in 1998 the Hospital hired two RNs to serve as staff RNs in the Valery Clinic.

In early June 1998 the Union learned that there were RNs working in the Valery Clinic to whom the Hospital was not applying the bargaining agreement. Cappuccino stated that in 1999 the Hospital hired an RN as an office practice nurse to work in the Valery Clinic and that she as Valery Clinic ad-

[6] During the Board's investigation of the unfair labor practice charge, the Hospital advised the Region that in 1999 there were approximately 20 PCCs. At the trial, Geissler testified that there presently were 32 PCCs working in about a third of the patient care units.

[7] The Respondent offered no evidence to explain why it failed to include the other RNs in the radiology department in the unit other than that Pam Micchelli, manager of standards and performance improvement and previously clinical nurse specialist in the radiology department and a witness for the Respondent, testified that when Lao transferred to the radiology department from the Hospital's operating room, where she had been a member of the bargaining unit, she elected to remain in the unit.

vanced practice RN received the additional title of nurse manager. In the year 2000, the Hospital hired an RN to work in the Valery Clinic as sickle cell/cog data manager coordinator, an RN to work as a PCC in the clinic, and another nurse clinician. Cappuccino related that currently, the Hospital employs in the Valery Clinic the following RNs: Herself as advanced practice nurse/nurse manager, a PCC, two office practice RNs, a sickle cell/cog data manager coordinator, and two part-time clinicians. The Hospital has excluded each of these RNs from the unit.

Pediatric Clinic RN

In June 1998, the Union first learned that the Hospital was employing an RN in the Pediatric Clinic. The parties stipulated that at times between November 1991 and December 1998, the Hospital employed an RN, Jean Weintraub in its Pediatric Clinic and failed to include her in the collective-bargaining unit represented by the Union.

The Union's Recognition Demands

By memo dated July 8 and received by the Respondent on August 12, 1997, the Union demanded recognition for the RNs in the radiology department, the cardiac catheterization laboratory, and for the patient care coordinator working in the telemetry unit, the RNs in the employee health area and additional RNs not at issue in this proceeding. In a telephone conversation on August 26, 1997, between Union Executive Director Clark and Hospital Director of Human Resources Marino, Clark requested the job descriptions for the RN positions listed in the Union's recognition demand, the names of the persons holding these positions and the shifts on which they worked. By letter dated September 8, 1997, the Union having failed to receive any of the requested information, asked the Respondent for a response to its recognition demand. The Hospital replied on September 10, 1997, asking for additional time to review the matter.

Hospital Director of Human Resources Martin Marino and Union Representatives Sondra Clark and Karen May met on October 20, 1997, to discuss the Union's recognition demand. At this meeting, Marino presented what he termed was the Hospitals' "initial thinking" on the matter. Marino said that the PCCs were managerial employees; the RNs in the employee health area were managerial and confidential employees; the Hospital excluded RNs in the cardiac catheterization laboratory from the bargaining unit because their work was technical; and that the RNs in the radiology department could be included in the bargaining unit with the exception of one nurse whom the Hospital wanted to title assistant clinical nurse specialist as a supervisor. Union Representatives Clark and May took the position that the cardiac catheterization RNs and the Employee Health RNs are nurses and therefore includable in the bargaining unit. As for the confidentiality contention, the Union alleged that all RNs handle confidential information. The Union Representatives also asserted that the PCCs performed bargaining unit work and direct patient care. Marino said that he was not aware that PCCs were doing direct patient care and would investigate this. He also stated that it was a package deal and the Hospital would not take any action until all of the bargaining unit status of the disputed RN classifications were discussed and agreed on by the parties. Marino advised that if the Respondent and the Union could not reach agreement on the recognition demand that the matter would have to be resolved by the Board.

May testified that the same parties' representatives had another meeting on January 13, 1998. Marino told the Union that the Hospital continued to regard the PCCs as managerial, as are employee health RNs since they made decisions concerning the status of RNs worker's compensation and that the work of the cardiac catheterization laboratory RNs was technical in nature and therefore not covered by the parties' collective-bargaining agreement. Marino reiterated that the Hospital would include the radiology department RNs in the bargaining unit except for one RN, a supervisor, as part of a package deal. At the end of this meeting, Marino proposed that if the Union withdrew a portion of another pending Board case, the Hospital would include the cardiac catheterization laboratory RNs and radiology department RNs in the bargaining unit. The Union rejected this proposal. At meetings' end, Marino repeated the Hospital's proposal and asked the Union to reconsider it.

On June 2, 1998, the parties met again to discuss the Union's recognition demand. At the meeting, May and Clark represented the Union while Marino and Manager of Human Resources Stacy Aster, the Hospital. At this meeting, the Union added additional RNs to its recognition demand: the case managers, the pediatric oncology outpatient nurses, and pediatric clinic nurse. Marino reiterated the Hospital's position that the PCCs were managerial, employee health RNs were both managerial and confidential, cardiac catheterization RNs were technical in nature, and that all but one radiology RN could be included in the unit. Marino also asked for a "fresh list" of the RN classification for which the Union sought recognition. May also testified that Marino also said, regarding the PCCs, "If the hospital—that having them not do—do direct patient care would cause financial hardship because the hospital would then have to hire more staff nurses to provide this—this work".

By memo dated June 3, 1998, the Union provided the Hospital with the list of RNs for "which the Union believes must be included in the current bargaining unit." On July 6, 1998, Clark left a telephone message for Marino requesting a meeting to discuss the Union's recognition demand. Clark called Marino again on August 10 and October 21, 1998, asking for a meeting on the recognition issue. There was no response from the Hospital. May testified that on October 22, 1998, after Clark saw an advertisement that the Hospital had placed in the local newspaper seeking to hire RNs to work at the Hospital's Union Cancer Center, Clark notified the Hospital that the Union wanted to add these RNs to the Union's demand for recognition. The Hospital, having failed to respond to the Union's requests for a meeting on the recognition issues, the Union then filed a charge in this case on December 24, 1998.

The Respondent notes in its brief that the Hospital filed a unit clarification petition with the Region, "seeking a determination that the disputed classifications should not be included in the bargaining unit." The Acting Regional Director for Region 22 dismissed the petition, on November 5, 1999, stating, "The Board has declared that unit clarification is not appropriate to change a unit description set forth in the parties' collective agreement. *Union Electric Co*., 217 NLRB 666, 667 (1975)."

He noted that the status of the disputed classifications were the subject of a pending unfair labor practice complaint.

The Respondent maintains and May acknowledged that at no time had the Union alleged to the Hospital that it represents a majority of the RNs in any of the disputed classifications. While May also testified that she had no way of knowing if the Union actually represented a majority of these RNs in "any grouping," she did admit that there was nothing to demonstrate that the Union did represent such a majority. The Respondent also asserts in its brief that the Union failed to file a grievance alleging that the Hospital violated the contract by its failure to extend the bargaining contract's coverage to the employees in the disputed classifications. Further, the Respondent notes that during negotiations for the 1996–1999 and 1999–2002 collective-bargaining agreements between the parties "the Union did not raise the subject of any of the disputed classifications or question their exclusion from the unit."

Credibility

Regarding the credibility of the respective parties' witnesses, after carefully considering the record evidence, I have based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. *American Tissue Corp.,* 336 NLRB 435 (2002); *New York University Medical Center*, 324 NLRB 887 (1997); *Gold Standard Enterprises*, 259 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977); and *Northridge Knitting Mills*, 223 NLRB 230 (1976). I tend to credit the testimony of the General Counsel's witnesses. Their testimony was given in a forthright manner, generally consistent and corroborative of each others, and consistent with other believable evidence in the record. Moreover, some of their testimony of consequence was actually corroborated by that of the Respondent's witnesses. Further, based on their demeanor I found them to be believable and trustworthy as witnesses.

This is not to say that I discredit all of the testimony of the Respondent's witnesses where it does not conflict with that of the General Counsel's witnesses. It appeared believable at those times.[8] However, I found that some of the testimony of the Respondent's witnesses was less than reliable, being at times inconsistent, evasive, and belligerent during cross-examination, and evidencing a demeanor less than forthright and believable.

Analysis and Conclusions

The complaint alleges that the Respondent, by excluding the patient care coordinators, X-ray registered nurses, or radiology nurses, employee health nurses, cardiac catheterization nurses, case manager nurses, pediatric oncology outpatient nurses, and pediatric clinic nurses from the bargaining unit represented by the Union and by refusing to recognize the Union as the collective-bargaining representative of these employees, the Respondent has thereby refused and failed to bargain in good faith with the Union in violation of Section 8(a)(1) and (5) of the Act.

An employer who fails to apply a collective-bargaining agreement to unit employees violates Section 8(a)(1) and (5) of the Act. *Gourmet Award Foods, Northwest*, 336 NLRB 872 (2001); *Moeller Bros. Body Shop*, 306 NLRB 191, 193 (1992); *General Equipment Co*., 297 NLRB 430, 434 (1989*);* and *Edward J. White, Inc*., 237 NLRB 1020 (1978). The Board in *Gourmet Award Foods, Northwest*, supra at 872, stated:

> It is axiomatic that when an established bargaining unit expressly encompasses employees in a specific classification, new employees hired into that classification are included in the unit. This inclusion is mandated by the Board's certification of the unit or by the parties' agreement regarding the unit's composition.

The recognition language in the collective-bargaining agreement in this case reads:

> The Employer recognizes the Union as the sole and exclusive collective bargaining representative of all full-time and regular part-time registered nurses and graduate nurses, including charge nurses and IV therapists employed by the Employer at its Livingston, New Jersey facility, but excluding all office clerical employees, graduate practical nurses and licensed practical nurses, infection control employees, utilization review employees, home health care coordinators, in-service instructors, computer coordinators, nutrition specialists, anesthesiology coordinators, other professional employees, other technical employees, service and maintenance employees, engineers, managerial employees, nursing coordinators, temporary employees, guards and supervisors, including head nurses and radiology nurse specialists, as defined in the Act, and all other employees.

This is the unit certified by the Board and includes RNs generally if the nurse does not fall within the stated exclusions. It is undisputed that the Hospital has hired RNs to work in its cardiac catheterization laboratory, and as case managers, and in its employee health department, pediatric clinic, pediatric oncology outpatient clinic, and radiology department without including any of these nurses in the bargaining unit.

The Hospital, as the party seeking to exclude RNs from the collective-bargaining unit has the burden of justifying the exclusion. *Gaines Electric Co*., 309 NLRB 1077, 1078 (1992); *Patriot-News*, 308 NLRB 1296, 1297 (1992), enfd. 5 F.3d 1490 (3d Cir. 1993); and *Bay Shipbuilding Corp.*, 263 NLRB 1133, 1140 (1982), enfd. 721 F.2d 187 (7th Cir. 1983). Moreover, it is the position of the General Counsel and the Union that even if the Hospital proves that some of these RNs are supervisory, managerial, or confidential employees, the Hospital must recognize the Union as the representative of the disputed RNs.

Patient Care Coordinators

The Respondent asserts that the patient care coordinators are supervisors within the meaning of Section 2(11) of the Act and therefore should be excluded from the unit of nurses.

Section 2(11) of the Act provides:

[8] It is not unusual that based on the evidence in the record the testimony of a witness may be credited in part, while other segments thereof are discounted or disbelieved. *Jefferson National Bank,* 240 NLRB 1057 (1979), and cases cited therein.

> The term "supervisor means" any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, responsibly to direct them, or to adjust their grievances, or effectively to recommend such actions, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The status of supervisor under the Act is determined by an individual's duties not by his or her title or job classification. *Demco New York Corp*., 337 NLRB 850 (2002); *New Fern Restorium Co*., 175 NLRB 871 (1969). Also see *Longshoremen ILA v. Davis*, 476 U.S. 380, 396 fn. 13 (1986). To qualify as a supervisor, it is not necessary that an individual possess all of these powers. Rather, possession of any one of them is sufficient to confer statutory status. *Demco New York Corp*., supra; *Cypress Lawn Cemetery Assn*., 300 NLRB 609 (1990); *Superior Bakery,* 294 NLRB 256 (1989), enfd. 893 F.2d 493 (2d Cir. 1990); and *NLRB v. Bergen Transfer & Storage Co.,* 678 F.2d 679 (7th Cir. 1982).

However, consistent with the statutory language and legislative intent, it is well recognized that 2(11)'s disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated functions. *HS Lordships*, 274 NLRB 1167 (1985); *NLRB v. Wilson-Crissman Cadillac, Inc*., 659 F.2d 728 (6th Cir. 1961). Indeed, as the court stated in *Beverly Enterprises v. NLRB,* 661 F.2d 1095 (6th Cir. 1981). "Regardless of the specific kind of supervisory authority at issue, its exercise must involve the use of true independent judgment in the employer's, interest before such exercise of authority becomes that of a supervisor." Thus the exercise of some supervisory authority "in a merely routine, clerical, perfunctory or sporadic manner does not elevate an employee into the supervisory ranks," the test must be the significance of his judgment and directions. *NLRB v. Wilson-Crissman Cadillac, Inc*., supra; *Lakeview Health Center*, 308 NLRB 75 (1992); *Hydro Conduit Corp*., 254 NLRB 433 (1991). Consequently, an employee does not become a supervisor merely because he gives some instructions or minor orders to other employees. *NLRB v. Wilson-Crissman Cadillac, Inc*., supra.

Nor does an employee become a supervisor because he has greater skills and job responsibilities or more duties than fellow employees. *Federal Compress Warehouse Co. v. NLRB,* 398 F.2d 631 (6th Cir. 1968). Additionally, the existence of independent judgment alone will not suffice for "the decisive question is whether [the employee] has been found to possess authority to use independent judgment with respect to the exercise . . . of some one or more of the specific authorities listed in Section 2(11) of the Act." *Advance Mining Group*, supra; *NLRB v. Brown & Sharpe Mfg. Co*., 169 F.2d 331 (1st Cir. 1958). In short, "some kinship to management, some empathetic relationship between employer and employee must exist before the latter becomes a supervisor for the former." *Advance Mining Group*, supra; *NLRB v. Security Guard Service,* 384 F.2d 1 (5th Cir. 1967). Moreover, in connection with the authority to recommend actions, Section 2(11) requires that the recommendations must be effective.

The burden of proving that an employee is a "supervisor" within the meaning of the Act rests on the party alleging that such status exists. *Pine Brooks Care Center,* 322 NLRB 740 (1996); *Ohio Masonic Home*, 295 NLRB 390 (1989); *RAHCO, Inc.,* 255 NLRB 235 (1983); *Tucson Gas & Electric Co*., 241 NLRB 181 (1974).[9] Where the possession of any one of the aforementioned powers is not conclusively established, or "in borderline cases" the Board looks to well-established secondary indicia, including the individuals' job title or designation as a supervisor, attendance at supervisorial meetings, job responsibilities, authority to grant time off, etc., whether the individual possesses a status separate and apart from that of rank-and-file employees. *NLRB v. Chicago Metallic Corp*., 794 F.2d 531 (9th Cir. 1986); *Monarch Federal Savings & Loan,* 237 NLRB 844 (1978); and *Flex-Van Corp*., 288 NLRB 956 (1977). However, when there is no evidence that an individual possesses any one of the several primary indicia for statutory status enumerated in Section 2(11) of the Act, the secondary indicia are insufficient by themselves to establish statutory supervisory status. *J.C. Brock Corp*., 314 NLRB 157 (1994); *St. Alphonsus Hospital*, 251 NLRB 620 (1982). Additionally, whenever there is inconclusive or conflicting evidence on specific indicia of supervisory authority, the Board will find that supervisory status has not been established with respect to those criteria.

In *NLRB v. Health Care & Retirement Corp*., 511 U.S. 571 (1994), the Supreme Court set forth the test for determining whether an individual is to be deemed a supervisor. The Court noted that in making a determination on the question of one's supervisory status:

> [T]he statute requires the resolution of three questions and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have authority to engage in one of the 12 listed activities [in section 2(11)]? Second, does the exercise of that authority require "the use of independent judgment"? Third, does the employee hold authority "in the interest of the employer"?

Id. at 573–574.

Veronica Geissler, the Respondent's administrative director for patient care services testified uncontradictedly[10] that there are approximately 800 bargaining unit nurses employed in 30 nursing units. There are currently 32 PCCs, with some units having one or more PCCs, others having none, this being based upon the size of the unit and number and acuity of the patients in the unit. Geissler stated that the PCC is responsible for as-

[9] However, in *NLRB v. Health Care & Retirement Corp. of America*, 987 F.2d 1256 (6th Cir. 1991), the Sixth Circuit held that the General Counsel has the burden of establishing supervisory status.

[10] While the testimony of Jamie Cappuccino, an advanced practice nurse and nurse manager of the Valery Center (Pediatric Hematology/Oncology Clinic) appeared somewhat belligerent and evasive on cross-examination, it did support Geissler's testimony as to the duties and responsibilities of the PCCs. Cappuccino testified that when she is not there the PCC supervises the employees on the unit can make or change nurse assignments, recommends evaluations, recommends hiring of employees, and effectively recommends disciplinary actions.

sisting the nurse managers in the operation of the nursing unit, ensures that quality patient care is delivered, and is responsible for managing and supervising the staff. Geissler related that there are times when only the PCC may be present for the supervision of nurses, technicians, and aides within the unit.

Geissler testsified that the PCCs are involved in the interviewing and hiring process of nurses and can effectively recommend the hiring of nurse applicants. The PCC may and does provide verbal counseling and issue verbal warnings which subsequently can be reduced to writing and included in an employees personnel file. Evidence was introduced to show that PCCs at times make annual evaluations of RNs at the Hospital, make daily nurse assignments based on vacation schedules, seniority, number of nurses needed, type of patients on the unit, etc. PCCs also can request additional staffing and reassign RNs based on nursing floor needs. Geissler also testified that on occasion, PCCs will substitute for nurse managers at staff meetings and can excuse latenesses. PCCs are salaried and receive a different package of benefits than that received by bargaining unit employees.[11] The Respondent also maintains that the PCCs "do not share a community of interest with other employees in the unit."

Based on the record evidence, I find and conclude that the PCCs meet the Board's definition of supervisor within the meaning of Section 2(11) of the Act. However, as the Respondent states in its brief, "It is noteworthy that the Union has acknowledged that the PCC is part of management. . . . The Union's labor representative testified that if the PCCs were not doing direct patient care, the Union would have no complaint and would concede they were part of management. The fact that the Union viewed PCCs doing direct patient care as a violation of its contract implies that the PCC was part of management, i.e., a supervisor doing bargaining unit work."

An employer violates Section 8(a)(1) and (5) of the Act when it reassigns work performed by bargaining unit employees to others outside the unit without affording notice or an opportunity to bargain to the collective-bargaining representative. *Harris-Teeter Super Markets*, 307 NLRB 1075 fn. 1 (1992). The evidence shows that the Hospital since 1995 has assigned bargaining unit duties, i.e., charge nurse duties and patient care assignments, to PCCs without notice and an opportunity to the Union to bargain. However, this is a not alleged in the complaint as a violation nor does it answer the question as to whether the PCCs belong in the appropriate unit represented by the Union.

The General Counsel and the Union assert that it makes no differences if PCCs are supervisors or managerial employees since they are assigned patient care duties like every other nurse who belongs in the unit. The General Counsel cites two particular cases in support of this position.

The Board in *Carolina Telephone & Telegraph*, 258 NLRB 1387 (1981), stated:

> In *Arizona Electric Power Corp.*, 250 NLRB 1132 (1980), we held that a unilateral attack on the integrity of an agreed-upon bargaining unit would be disruptive of an established bargaining relationship, and that therefore the scope of a unit may be changed only by mutual agreement of the parties or by Board action. Consequently, we found that a respondent's unilateral action in withdrawing recognition from a union as representative of certain employees during midterm of a contract, the bargaining unit of which the parties had knowingly and voluntarily negotiated, violated the Act. We noted that our conclusion would not be altered by a finding that the employees affected by the Respondent's action were supervisors or managerial employees. Id. at 1133–1134. [12]

Moreover, in *Gratiot Community Hospital,* 312 NLRB 1075 fn. 2 (1993), enfd. 51 F.3d 1255 (6th Cir. 1995), the Board held:

> The judge found that some of the nursing supervisors were statutory employees. We do not reach that issue. For, even assuming arguendo that all the nursing supervisors, were statutory supervisors the unilateral changes regarding them would nonetheless be unlawful. In this regard, we note that the parties have agreed to include all nursing supervisors in the unit, and they were covered by a contract at the time of the changes here. We have held that when parties to a collective-bargaining relationship, as here, have voluntarily agreed to include supervisors in a unit, the Board will order the application of the terms of the collective-bargaining agreement to those supervisors. *Union Plaza Hotel & Casino*, 296 NLRB 918 fn. 4 (1989), enfd. sub nom. *E.G. & H. Inc. v. NLRB,* 949 F.2d 276 (9th Cir. 1991), citing *Arizona Electric Power Cooperative,* 250 NLRB 1132 (1980).
>
> We perceive no basis for departing from this rule here, despite the contract's recognition clause which excludes "supervisors within the meaning of the National Labor Relations Act." Although the Respondent could not be compelled to recognize the Union as the representative of a unit containing supervisors, the Respondent certainly could, and did, agree to a contract that covered certain individuals found to be supervisors. *NLRB v. News Syndicate Co.,* 365 U.S. 695, 699 fn. 2 (1961).[13]

However, I find these cases distinguishable. In each case the employees, for whom the respondent's unilateral action in withdrawing recognition from a union during the terms of the collective-bargaining agreement, were "knowingly and voluntarily negotiated" into the bargaining unit in the agreement.

The patient care coordinators have been traditionally excluded from the unit of nurses found to be appropriate between the parties because they were believed to be supervisors. I find nothing in the record to dispel this. Therefore, I find that the

[11] The PCC job description in evidence (GC Exh. 11) states that the PCC supervises the "RNs, LPN's NAS and unit clerks."

[12] In *Carolina Telephone Co*., supra, the Board found that stenographic clerks had been included in the unit of the collective-bargaining agreement and the respondent, having withdrawn recognition in midterm from the Union regarding these employees violated Sec. 8(a)(1) and (5) of the Act, even if the clerks were truly confidential employees excludable by Board policy.

[13] Also see *Bozeman Deaconess Foundation*, 322 NLRB 1107 (1997); *F.G. Lieb Construction Co*., 318 NLRB 914, 916 (1995); *Texaco Port Arthur Employees Federal Credit Union*, 315 NLRB 828, 830 (1994).

patient care coordinators should be excluded from the unit of nurses as supervisors within the meaning Section 2(11) of the Act, as provided for in the language of the appropriate unit.

Employee Health RNs

The Respondent contends that the employee health nurses should be excluded from the unit of nurses because they were "excluded historically," their inclusion would give rise to a "conflict of interest" with nurses in the established unit, and they do not have a community of interest with other nurses in the unit. Clinical Director of Employee Health Service Sarah Hassert testified that the employee health service is responsible for seeing that the Hospital is in compliance with regulatory mandates of administrative agencies. Hassert testified that since 1996, employee health RNs have given preemployment drug and tuberculosis tests to applicants for positions at the Hospital. The Hospital or regulatory agencies have determined the acceptable levels for these tests. Staff RNs in the emergency room may also give drug tests. Employee health RNs may communicate the results of tuberculosis tests to department heads in the Hospital. Moreover, the Hospital has issued general guidelines that determine whether an employee may return to work after being out for medical reasons. The employee health nurses using these guidelines assess the health of an employee and determine whether they can return to work. The employee health RNs may also refer the matter to the employee health practitioner or the doctor.[14]

In discussion with the Union the Respondent also asserted that the employee health RNs are confidential employees. The Respondent therefore has the burden of proof on this issue. *Crest Mark Packing Co*., 283 NLRB 999 (1987). The Board has held that the only employees to be excluded from a collective-bargaining unit due to confidentiality are those "that assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *Lincoln Park Nursing Home*, 318 NLRB 1160, 1164 (1995); *Bakersfield Californian*, 316 NLRB 1211 (1995); and *B.F. Goodrich Co*., 115 NLRB 722 (1956). The Board uses the "labor nexus" test which was approved by the Supreme Court in *NLRB v. Hendricks County Rural Electric Membership Corp*., 545 U.S. 170 (1981). The employee health RNs access to medical or personnel records is insufficient to establish that they are confidential employees. *Milwaukee Children's Hospital Assn.*, 255 NLRB 1009, 1014 (1981); *Ladish Co.,* 178 NLRB 90 (1969); *Hampton Roads Maritime Assn.,* 178 NLRB 263 (1969); and *RCA Communications*, 154 NLRB 34, 37 (1965).[15] The employee health nurses are indistinguishable from any other nurse at the Hospital who would have access to the medical records of any RN who became a patient of the Hospital or who was tested for any reason, including drug tests. The Respondent has failed to sustain its burden of showing that the employee health RNs are truly confidential in the sense that they assist and act in a confidential capacity to persons who formulate, determine, and affectuate management policies with regard to labor relations. *Ladish Co.*, supra; *Hampton Road Maritime Assn.*, supra.

Nor do the employee health RNs appear to be managerial employees. They do not formulate and effectuate management policy or exercise discretion independent of the Respondent's established policies and rules. *Milwaukee Children's Hospital Assn.*, 255 NLRB at 1014. The role of the Employee Health RNs with respect to decisions concerning employees is either to communicate medical information or to apply preexisting criteria.

I therefore find and conclude that the Respondent has failed to establish that the evidence herein warrants the exclusion of the employee health RNs from the unit of nurses and based on the record as a whole, the employee health RNs are primarily nurses who should be included in the appropriate unit of registered nurses.

Cardiac Catheterization Laboratory RNs

The Respondent takes the position that the cardiac catheterization RNs are technical employees who should be excluded from the unit. The Board defines technical employees as those employees who do not meet the strict requirements of the term "professional employees" as defined in the Act, but whose work is of a technical nature, involving the use of independent judgment and requiring the exercise of specialized training usually acquired in colleges or technical school, or through special courses. E.g., *Folger Coffee Co.*, 250 NLRB 1 (1980). The Board considers RNs to be professional employees, not technical employees. See Board's Rules and Regulations, Rule 103.30; *Health Care Rulemaking*, 284 NLRB 1515; *Southern Maryland Hospital Center*, 274 NLRB 1470 (1985). Thus, the Respondent has failed to establish the exclusion of the catheterization laboratory nurses on this basis.

Case Managers

The Respondent asserts that case managers have historically been excluded from the unit, they are among the functional exclusions specified in the bargaining unit's description as (utilization review employees), and do not share a community of interest with those nurses included in the bargaining unit.

Susan Sorge, manager of the case management department testified that the nurses who performed utilization review prior to 1998 reviewed medical records to determine whether the Hospital received the appropriate reimbursement from insurance companies for patient care,[16] Sorge stated that in about

[14] The Respondent states in its brief that, "It is evident from the foregoing that the employee health nurses do not share a community of interest with employees in the unit." The community of interest issue is generally discussed in another section of this decision. The Respondent continues that "Furthermore they have been historically excluded from the unit and their inclusion now, without benefit of an election, would deprive them of their Section 7 rights. They are not engaged in patient care, they have responsibilities closely aligned with management, and inasmuch as they must determine whether an employee is fit for duty, their inclusion would give rise to a disturbing conflict of interest."

[15] Also see *S.S. Joachim & Ann Residence*, 314 NLRB 1191 (1994); *Lincoln Park Nursing Home*, 318 NLRB 1160 (1975).

[16] Sorge testified:

> A Utilization Review Nurse reviews the medical documentation and the medical records throughout the Hospital. They collaborate that information to the insurance companies on a daily basis to make sure that we are getting the appropriate financial re-

1998, the Hospital created the position of case manager by merging and cross-training RNs who performed utilization review functions with RNs who planned patient's discharges and postdischarge activities.[17] Sorge described the case managers' duties as "assessing patient care throughout the patient's hospitalization, planning a patient's discharge and to meet a patient's postdischarge needs, such as providing for home health care."[18] While the Hospital requires case managers to be RNs, and the evidence indicates that utilization review is but another function in a set of tasks performed by the current case managers, it is undisputed that case managers do not perform patient care service per se. The evidence as to current case manager duties also supports the conclusion that case managers are substantially dissimilar from the former utilization review employees.

The Board in *Ralph K. Davies Medical Center*, 256 NLRB 1113, 1117 (1981),[19] stated:

> More importantly, the utilization review coordinators are not involved with direct patient care. Rather, they perform the purely administrative function of determining the most effective and efficient use of the Hospital's facilities by monitoring patient care, primarily through patient records, to assess whether it falls within government and insurance company guidelines. . . . Accordingly, we conclude that the utilization review coordinators do not share a sufficient community of interest with the registered nurses and we shall exclude them from the unit herein.

I find these cases distinguishable. While the Board has excluded utilization review RNs from units of nurses because they are not involved in direct patient care and perform purely administrative functions, when the Respondent created the Case Manager position by merging and cross-training RNs who performed utilization review functions with RNs who planned patient's discharges and postdischarge activities, based on the case manager's new duties, with implied substantial interaction with other RNs to accomplish that position and the requirement that they be RNs, they could no longer fall purely under the classification of "utilization review employee."

Therefore, from the evidence herein I find and conclude that the RNs working as case managers should be included within the scope of the bargaining agreement.

Radiology Nurses

The Hospital's department of radiology employs six RNs. One nurse, Myrna Lao, is a member of the bargaining unit.[20] The appropriate unit set forth in the collective-bargaining agreement between the parties excludes from the unit "supervisors, including head nurses and radiology nurse specialists, as defined in the Act." While there was evidence that there was one supervisor of the RNs in the radiology department entitled, "Clinical Nurse Specialist" but the record is unclear as to whether "Clinical Nurse Specialist" was synonymous with "Radiology Nurse Specialist."

However, the evidence was unrebutted that all of the RNs in the radiology department perform essentially the same work, and that the Respondent applies the contract to one RN, Myrna Lao, but not the other RNs therein. The Respondent has failed to carry its burden of showing that the radiology RNs should be excluded from the bargaining unit.

I therefore find and conclude that the radiology RNs should be included in the unit of nurses, except for the "Clinical Nurse Specialist" as a supervisor.[21]

Pediatric Oncology Outpatient Clinic RNs

The Respondent maintains that the RNs in the Pediatric Oncology Outpatient Clinic (Valery Clinic) should be excluded from the bargaining unit. Advanced Practice Nurse Manager Jamie Cappuccino testified that when the Valery Clinic opened in 1997, as advanced practice nurse she had "indirect" supervision over the patient care coordinators in the Clinic. However, Cappuccino's job description as advanced practice nurse does not bear this out, indicating instead that she had at that time no responsibility to supervise anyone. Moreover, even as Cappuccino was given the added title of nurse manager in about 1999, the evidence shows that another employee, Kathleen Nunn, not Cappuccino, is the PCC supervisor in the Valery Clinic[22] Cappuccino stated that she has the authority to hire employees with the "final approval from my director," and that her duties as nurse manager encompass responsibilities "for administrative duties. . . for supervising the Nursing Staff; for getting a budget together for the Valery Center; for making assignments; for just being supportive to the staff." She also performs evaluations of RNs in the Valery Clinic.[23] I believe that there is sufficient

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imbursement to (sic) the insurance companies and that the patient is at the appropriate level of care.

It is undisputed that since the initial collective bargaining contract between the parties "utilization review employees" have been excluded from the bargaining unit.

[17] After the merger, there were approximately 12 case managers. There are presently 31 case managers at the Hospital.

[18] Sorge testified:

> A Case Manager is really a collaborative process of assessing, evaluating, and implementing the patient's care throughout the continuum of their hospitalization and post-discharge needs. So they will assess a patient at the beginning of the patient's hospitalization. If needed, relay all critical information to the payer . . . and establish a plan–a working disposition of discharge plan for the patient. If the patient should need any kind of post-discharge–planning needs, they would be the facilitator of those plans.

[19] Also see *Addison-Gilbert Hospital*, 253 NLRB 1010 (1981). In *St. James Hospital of Newark*, 248 NLRB 1045, 1046 (1980) (utilization review coordinators included in bargaining unit of professional employees).

[20] When Lao transferred into the department of radiology from a bargaining unit classification, she was permitted by her immediate supervisor, at her election, to remain in the bargaining unit.

[21] It is interesting to note that during negotiations between the parties regarding the radiology nurses the Respondent offered to include them in the unit as part of a package deal on all the disputed positions if agreement was reached on them all, and if the Union would withdraw a part of a pending Board case. The Hospital also agreed to include the cardiac catheterization laboratory nurses as well. The Union rejected this.

[22] However, Cappuccino disputed that Nunn supervises the PCCs or any other RNs at the Valery Center.

[23] Prior to December 24, 1998, while Cappuccino testified that she was a supervisor as advanced practice nurse, she never hired anyone;

evidence in the record to find that Cappuccino is a supervisor within the meaning of Section 2(11) of the Act.

The Respondent would thus exclude Advanced Practice Nurse/Nurse Manager Jamie Cappuccino as a supervisory RN; the patient care coordinator, as discussed previously generally under patient care coordinators nurses; the sickle cell coordinator under the nursing coordinator unit exclusion, whose responsibility is to educate sickle cell patients, running support groups associated with such patients and is responsible for data management with respect to the Children's Oncology Group (COG); the nurse clinicians who work in the inpatient unit for children and are responsible for the education of their families and staff and community education and make rounds with physicans attending patients. The Respondent asserts that the two office practice RNs have been unrepresented since the inception of the Valery Clinic and the Union is "two late in seeking their inclusion over a period of one or two collective bargaining agreements."[24]

Therefore, I would include all the Pediatric Oncology Outpatient Clinic RNs in the unit of nurses except for the advanced practice nurse/manager who should be excluded as a supervisor within the meaning of Section 2(11) of the Act.

The 10(b) Period

Section 10(b) of the Act provides, "That no complaint shall issue based on any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such change is made." *Dunn & Bradstreet Software Services,* 317 NLRB 84 (1995), affd. 79 F.3d 1238 (1st Cir. 1996). Section 10(b) is a statute of limitation and is not jurisdictional in nature. It is an affirmative defense which must be pleaded and if not timely raised is waived. *Federal Management Co.,* 264 NLRB 107 (1987). Also, the burden of proving such an affirmative defense rests squarely on the party asserting it. *Kelly's Private Car Services*, 289 NLRB 30 (1988), 919 F.3d 839 (2d Cir. 1990); *Chinese American Planning Council, Inc*., 307 NLRB 410 (1992). Moreover, it is firmly established that the 10(b) period commences when a party has clear and unequivocal notice of the violation of the Act. *Mine Workers District 17*, 315 NLRB 1052 (1994); *Leach Corp.,* 312 NLRB 990, 991 (1993), enf. 54 F.3d 802 (D.C. Cir. 1995); *A&L Underground*, 302 NLRB 467, 468 (1991), or where a party in the exercise of reasonable diligence should have become aware that the Act had been violated. *Carrier Corp*., 319 NLRB 184 (1995); *Moeller Bros. Body Shop*, 306 NLRB 191, 192–193 (1992); and *Oregon Steel Mills*, 291 NLRB 185, 192 (1988), cert. denied sub nom. *Gilmore Steel Corp. v. NLRB*, 496 U.S. 925 (1990).

In applying these principles to the instant case, it is the Respondent who has the burden of demonstrating that the Union obtained clear and unequivocal notice that the Respondent was excluding RNs in the disputed categories from the bargaining unit and refusing to recognize the Union as the bargaining representative for these employees. The Board has held that "those whose delay in filing as a consequence of conflicting signals or otherwise ambiguous conduct by the other party" are not barred by the Board's requirement that a party promptly file a contract repudiation charge. *A&L Underground,* 302 NLRB 467, 469 (1991).[25] Where an employer is applying a contract to some but not all unit employees, and has indicated interest in resolving the matter, the 10(b) period does not run until the Employer provides clear and unequivocal notice that it is not going to resolve the matter. *Sterling Nursing Home*; 316 NLRB 413, 416 (1995).

In this case, the Union never received clear and unequivocal notice prior to the 10(b) period that the Hospital rejected the Union's demand that the Hospital recognize the Union as the representative of the disputed RNs. Rather, the Union filed the instant unfair labor practice charge when, after a series of meetings between the parties in which they discussed the Union's demand, the Hospital eventually failed to respond to the Union's request to resume meetings. At the time the Union filed its charge, the Hospital had failed to respond in an unequivocal manner to the Union's amended demand for recognition, which the Union presented to the Hospital at a meeting in early June 1998. At this meeting the Union added the case managers, the pediatric oncology nurse, and the pediatric clinic nurse to its recognition demand having just learned that RNs were working in these titles. The Hospital responded by requesting a "fresh list" of the RNs for whom the Union was demanding recognition. However, the Hospital never responded to the demand for recognition by the Union for the case managers, pediatric oncology clinic, and pediatric clinic nurses leaving this matter as a whole unresolved. The Union sent its revised recognition demand to the Hospital on June 3, 1998, immediately after this meeting. Thereafter, the Union left messages for the Hospital's representative during July through October 1998 seeking to resume meeting.[26] But the Hospital never responded to the union messages, nor contacted the Union to schedule a meeting.

Moreover, the matter remained ambiguous after June 1998 because the Hospital conditioned resolution of the recognition demand as to any disputed RN, contingent on agreement as to all of the disputed RN positions, although its position on some

never transferred, suspended, laid off, recalled, promoted, fired, rewarded, or disciplined any nurse. She however, stated that she did "informally" discipline employees.

[24] The complaint includes pediatric clinic nurse as a classification for which bargaining is sought. The Union's executive director, Sondra Clark, testified that the Union was unclear as to the Pediatric Clinic, "I think this was an overstatement." Clark also testified that she could not recall that there were any nonsupervisory RNs working in the Pediatric Clinic and that the Union's focus was on the Pediatric Oncology Outpatient Clinic.

[25] Also see *Waste Management of Utah*, 310 NLRB 883, 886 (1993); *Stamford Realty Assn*., 306 NLRB 1061, 1065 (1992); *Logan County Airport Contractors*, 305 NLRB 854 (1991); and *Christopher Street Corp*., 286 NLRB 253 (1987), enfd. 926 F.2d 1215 (D.C. Cir. 1991).

[26] A review of the chronology of the case before June 3, 1998, shows that the Hospital's practice was not to respond to a union demand for recognition pertaining to disputed RNs until it investigated the matter. Also, it was not unreasonable for the Union to wait this long. The facts here show that the Hospital had in the past taken many months to schedule a meeting with the Union on its successive recognition demands.

of the disputed RNs such as the exclusion of the PCCs remained adament. Additionally, the mere fact that the disputed RNs work in the Hospital is insufficient to put the Union on notice that the Hospital employed these nurses but excluded them from the coverage of the collective-bargaining agreement.[27] Here, the size of the Hospital, with 600 plus beds and 850 plus nurses working in approximately 36 patient care units, precluded constructive notice to the Union that the Hospital clearly employed some of the disputed nurses.[28]

Regarding the Respondent's assertion that the Union had unequivocal notice that the Respondent's position was to exclude the PCCs from the unit. However, regardless of the Respondent's position it was required to bargain over the issue of assigning them unit work. A refusal to bargain is not ripe when an employer has merely failed to respond to a union demand for bargaining, *Waste Management of Utah*, 310 NLRB at 886; *Stanford Realty Associates*, 306 NLRB at 1065. The Respondent had told the Union that the resolution of the issue of whether these nurses could perform unit work was tied to the Union's demand for information concerning the PCCs. The Union's Board case involving its demand for such information remained pending prior to and during the 10(b) period. Therefore, when the Union filed its charge insofar as it concerns the PCCs, the 10(b) period had not begun.

Also, a party is not required to file its charge based on mere suspicion. *R.G. Burns Electric*, 326 NLRB 440 (1998). Equitable considerations allow permitting a party to wait to file its charge until it has acquired sufficient information to support the charge. *Barnard Engineering Co.*, 295 NLRB 226, 250–251 (1989). Moreover, Board policy is to encourage parties to attempt settlement of their disputes within the framework of collective bargaining. Here, the Union attempted to resolve the issues raised by its demand for recognition of the disputed RNs by requesting information and discussing the demand with the Hospital. The Union promptly notified the Hospital of its suspicions and requested information from the Hospital that "would have given [it] a clearer picture of the alleged noncompliance." *Sterling Nursing Home*, 316 NLRB at 416. As evidenced in the record, while the Respondent failed to provide the Union with the information it requested, it encouraged the Union to reach a settlement of the issues raised in its recognition demand.

Even if the Union is not entitled to a remedy from the date the Respondent began excluding the disputed RNs, the Union is entitled to a remedy for the 6 months prior to filing its charge. The Respondent's failure to recognize the Union as the representative of the disputed RNs is a series of separate and distinct violations. During the term of a collective-bargaining agreement, a unilateral change in a contractual term can result in "a separate and distinct violation of the Act" each time the affected term is scheduled to occur. *Farmingdale Iron Works,* 249 NLRB 98 (1980), enfd. 666 F.2d 910 (2d Cir. 1981), citing *Tide Water Associated Oil Co.*, 85 NLRB 1096 (1949). In *Chemung Contracting Corp*. 291 NLRB 773 (1988), the Board held that the separate and distinct violation doctrine could only be applied to a unilateral change made during the term of an existing collective bargaining agreement. See also *Vallow Floor Coverings*, 335 NLRB 20 (2001); *A&L Underground*, 302 NLRB 467 (1991).

In *Moeller Bros. Body Shop*, 306 NLRB at 193, while the Board concluded that the charging party, a union, failed to exercise "reasonable diligence" in discovering the respondent's misconduct and therefore Section 10(b) of the Act bars any violation of the Act, the Board nevertheless granted a remedy for the respondent's failure to apply the contract to all members of the unit during the 10(b) period. Thus, a failure to apply a contract to members of a bargaining unit is a repetitive violation. In the instant case, the Union filed its charge within the term of the parties 1996–1999 bargaining contract. *Moeller Bros. Body Shop,* supra; *Farmingdale Iron Works*, supra; *Schora Stern Food Corp*., 227 NLRB 1650, 1654 (1977). Should a violation be found, the Union would be entitled to, at a minimum, a remedy for the 6 months prior to the date it filed its charge. *Vallow Floor Coverings*, supra; *Moeller Bros. Body Shop*, supra; *A&L Underground*, supra; *Farmingdale Iron Works*, supra*; Schorr Stern Food Corp.*, supra.

The Respondent's Other Defenses

Unit Clarification

Unit clarification is appropriate for resolving ambiguities concerning the unit placement of individuals who come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category—excluded or included—that they occupied in the past. *Union Electric Co.*, 217 NLRB 666, 667 (1975).[29] Clari-

[27] See *AMCAR Div.*, *ACF Industries*, 234 NLRB 1063 (1978), enfd. 596 F.2d 1344 (8th Cir. 1979).

[28] The Union filed the unfair labor practice charge on December 24, 1998. As to the case managers, the pediatric oncology clinic staff nurses, the pediatric oncology clinic office practice nurse, the pediatric oncology clinic sickle cell/DOG data manager coordinator, and the pediatric clinic nurse, the Hospital provided no evidence that it hired any of these RNs more than 6 months before the Union filed its charge. Accordingly, the 10(b) defense is inapplicable to these RNs.

The Respondent states that the subject of the case manager, pediatric oncology outpatient nurse, and the pediatric clinic nurse was first raised at the June 2, 1998 meeting between the Union and Marino. At that time, the case manager position had just become functional. The pediatric oncology outpatient nurses had been working in the Valery Clinic since it opened in approximately 1996. None of the RNs in these positions were included in the bargaining unit when the Union made its recognition demand for them on June 2, 1998. The Hospital took the position that they should be excluded. The Respondent in its brief posits from this "It is clear from the meeting of June 2, 1998, that these titles would continue to be excluded from the unit, and consequently the 6 month-limitations period began to run from that date, meaning that the charge filed and served in late December was untimely."

I do not agree. At this meeting Director Marino asked for additional information from the Union indicating that further discussion on the issue of the disputed RNs might possibly ensue regardless of the Hospital's current position on these RNs.

[29] In cases involving employees hired into newly created classifications not plainly included in or excluded from the established unit, disputes concerning the unit status of employees in the new classifica-

fication is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, "even if . . . the practice has become established by acquiesence and not express consent." Id. Also see *Plough, Inc*., 203 NLRB 818 (1973), and cases cited therein. Here, the unit definition is clear and based on the positions of the parties, includes or excludes the disputed nurses. *Gourmet Award Foods, Northeast*, supra. Thus, unit clarification is, during the term of the contract between the Hospital and the Union, not the appropriate vehicle for resolving this dispute.

Community of Interest

The Board in *Kendall College*, 228 NLRB 1083, 1084 (1977), held that an employer may not defend against an 8(a)(5) charge concerning removal of unit employees from a bargaining unit by asserting that the certified unit is inappropriate. Thus, it would appear that the contentions of the Respondent in this case that some of the disputed RNs lack a "community of interest" with the represented RNs is not viable in this unfair labor practice case. Moreover, a party cannot litigate issues that could have been litigated in an underlying representation hearing in a case involving a refusal to bargain allegation *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 162 (1941); Board's Rules and Regulations, Rule 102.67(f). Assuming arguendo that community of interest could be litigated here, the concept that RNs have a community of interest with other RNs has been established by the rules authorizing an RN unit. See Board's Rules and Regulations, Rule 103.30; *Health Care Rulemaking*, 284 NLRB 1515 (1987).[30]

For example, the Respondent asserted that the cardiac catheterization laboratory RNs lacked a community of interest with the staff RNs. Frank Soldo Clinic Director of the Cardiac Catheter Laboratory testified that the cardiac catheterization RNs use more sophisticated equipment than used by other RNs in the Hospital, "in patient care units."[31] However, RN Eric Polo, a witness for the General Counsel, testified in detail regarding the work performed by RNs in the intensive care unit, coronary care unit, neurosurgical intensive care unit, and emergency room which demonstrated that the work performed by RNs in those units was just as technical as any work performed by RNs in the cardiac catheterization laboratory.[32] Moreover, RNs in these units assist the doctors in administering catheters similar to those used in the cardiac catheterization laboratory where the role of RNs is also to assist in the use of catheters.[33] Soldo stated that RNs in the cardiac catheterization laboratory undergo a 3-month orientation period overseen by an RN acting as preceptor. But this is not unique to the cardiac catheterization laboratory. Other RNs in other units may undergo preceptorships, i.e., the operating room. Cardiac catheterization laboratory RNs wear special badges to monitor radiation which they may be exposed to, but RNs in the operating room also wear such badges.

Having found that the cardiac catheterization laboratory RNs should not be excluded from the unit on the basis that they are technical employees, and, assuming arguendo, that the Hospitals can litigate community of interest issues in this case, and finding that the Hospital has failed to carry its burden to show that the interests of the cardiac catheterization RNs is sufficiently separate to justify excluding them from the unit of RNs, I find and conclude that the cardiac catheterization laboratory RNs should be included in the bargaining unit. *John P. Scripps Newspaper Corp.*, supra.

The Respondent alleges that there is no contractual or statutory basis for including the disputed titles (some 80 RNs) in the bargaining unit, absent self-determination. None of the employees who work in these titles have ever been represented by any union and some have existed outside the bargaining unit for up to 25 years. Four of the disputed titles existed before the Union was certified and before it negotiated the first of its four bargaining contracts with the Hospital. It appears that the Union never questioned the exclusion of any of these titles in any of the contract negotiations.[34] The Respondent asserts that the basis for including/excluding certain RNs as agreed between the parties was "whether they provided direct patient care."[35] The Hospital states that, thus, since the disputed titles of RNs are not involved in direct patient care "in the traditional sense of bed-side nursing, the 'hands-on work' of responding to patient needs," they should not be included in the unit of RNs.

tions, are resolved by timely unit clarification proceedings applying an accretion analysis. *Gourmet Award Foods*, *Northeast,* supra. The Board in the accretion analysis examines community of interest factors to determine whether the employees at issue may constitute a separate appropriate unit or constitute an accretion to the existing bargaining unit. *Towne Ford Sales*, 270 NLRB 311 (1984).

"Once it is established that a new classification is performing the same basic functions as a unit classification historically had performed, the new classification is properly viewed as remaining in the unit rather than being added to the unit by accretion. Accordingly, an accretion analysis in these circumstances is inapplicable." *Premcor, Inc*., 333 NLRB 1365 (2001).

[30] In *Salem Hospital*, 333 NLRB 560 (2001), the Board found it appropriate to put RNs working as case managers in a unit with RNs who provide patient care. Such a unit was found appropriate despite the fact that the case managers did not provide patient care, as long as the Employer requires case managers to be RNs. This is also true in the situation in this case as regards case managers at St. Barnabas Hospital. Also see, *John P. Scripps Newspaper Corp*., 329 NLRB 854 (1999).

[31] However, on cross-examination, Soldo conceded that he was unfamiliar with other equipment used in the Hospital outside the cardiac catheterization Laboratory.

[32] Polo has worked in the operating room and acute care units, including the intensive care unit, coronary care unit, neurosurgical intensive care unit and emergency room of St. Barnabas Hospital.

[33] Catheters are not unique to the cardiac catheterization laboratory. RNs in the operating room and in the intensive care unit assist in using catheters on a daily basis. RNs do not insert the catheters but assist the physicians who do so.

[34] It is questionable whether the Union even knew that nurses were filling some of these positions at the time or even that such positions now existed, i.e., case managers nurses.

[35] Direct patient care means, "actual patient care work, direct patient care, hands-on work. Whatever the patient's needs were." Whether the unit was limited solely to this is unclear from the record as to just what the actual definition of "direct patient care, is, i.e., Cardiac Catheter Laboratory nurses and Radiology Laboratory nurses duties."

"[R]egistered nurses are unique in that their profession requires continuous patient interaction." *The Child's Hospital,* 310 NLRB 560, 562 (1993).

The Respondent lists the employee health nurse and case manager's as not interacting with any patients in their work, or performing work which qualifies as direct patient care. According to the Respondent, the radiology laboratory, and cardiac catheterization Laboratory nurses are involved in testing and diagnostic procedures. While the Hospital maintains that, "Much of that type of work can be, and is, done outside of a hospital setting," yet it would appear that these RN positions involve some nursing duties and direct care. The Respondent also states that the pediatric outpatient oncology nurses spend most of their time in education efforts with staff members, patient's families, and the community, but there must be some patient care involved. However, the unit description clearly includes all RNs except for those explicitly listed as excluded therein.

As regards the patient care coordinators, based on the evidence I found them to be supervisors within the meaning of Section 2(11) of the Act and these RNs should therefore be excluded from the unit.

The Respondent citing *United Parcel Service*, 303 NLRB 326 (1991), as applicable to the instant case, argues that "the Union cannot evade the Board's longstanding principle that where employees, who are now alleged to have common interests with unit employees, have nonetheless been excluded from that unit, and where one or more negotiated contracts has failed to address the situation, the union has only itself to blame." This case is distinguishable for the reasons set forth above in the section of this decision involving the Respondent's affirmative defenses.

From all of the above and in reviewing the language of the appropriate unit as set forth in the applicable collective-bargaining agreement between the Hospital and the Union, I find and conclude that the Respondent has failed to carry its burden of establishing that the following disputed RN positions should be excluded from the unit of nurses: Employee health nurse RNs, radiology department RNs, cardiac catheterization laboratory RNs, case manager, RNs, pediatric oncology outpatient clinic (Valery Clinic), and the pediatric clinic RN. These nursing positions should be included in the unit of nurses excluding any supervisors within the meaning of Section 2(11) of the Act. I also find that the Respondent has, established that the disputed position of patient care coordinator (PCCs) are supervisory RN positions within the meaning of Section 2(11) of the Act and should be excluded from the unit as such.

Accordingly, I find that by failing and refusing to recognize the Union as the collective-bargaining representative of the RNs in the classifications listed above, the Respondent has failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operation of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. The Respondent shall be ordered to honor the terms of the current collective-bargaining agreement with the Union and to apply the terms of the agreement to the disputed RNs until the contract's expiration. The Respondent shall also be ordered to make whole these RNs for any losses sustained by them by virtue of the failure to apply the applicable bargaining agreements to them and make the union benefit funds whole for moneys owed to them under these agreements, and make the Union whole for any loss of dues as a result of the failure or delay in giving effect to any dues-checkoff authorizations by any of these RNs. [36]

Because of the nature of the unfair labor practices found here, and in order to make effective the interdependent guarantees of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post the customary notice.

CONCLUSIONS OF LAW

1. Saint Barnabas Medical Center is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time nurses and graduate nurses, including charge nurses and IV therapists, employed by the Employer at its Livingston, New Jersey facility, but excluding all office clerical employees, graduate practical nurses and licensed practical nurses, infection control employees, utilization review employees, home health care coordinators, in-service instructors, nursing instructors, computer coordinators, nutrition specialists, anesthesiology coordinators, other professional and non-professional employees, other technical

[36] The make-whole remedy shall be computed in accordance with Board law. Wages owed shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), with interest computed as in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). See also *Florida Steel Corp*., 231 NLRB 651 (1977), and *Isis Plumbing Co*., 138 NLRB 716 (1962). Fringe benefit payments shall be computed in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979); and *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), and the funds are to be made whole under *Stone Boat Yard*, 264 NLRB 81 (1982), enfd. 715 F.2d 441 (9th Cir. 1983), cert. denied 466 U.S. 937 (1984). Union dues are to be computed in accordance with *Parkview Furniture Mfg. Co*., 284 NLRB 947, 974 (1987).

employees, service and maintenance employees, engineers, managerial employees, nursing coordinators, temporary employees, guards and supervisors, including head nurses and radiology nurse specialists, as defined in the Act, and all other employees.

4. On or about August 12, 1991, the Union was certified as the exclusive collective-bargaining representative of the Unit. Since on or about August 12, 1991, the Union has been the designated exclusive collective-bargaining representative of the Unit and has been recognized as such representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from November 2, 1999, to November 1, 2002.

5. The disputed categories in which the Respondent employs registered nurses are patient care coordinator (PCC), radiology nurse, employee health nurse, cardiac catheterization laboratory nurse, case manager, pediatric oncology outpatient nurse, and pediatric clinic nurse.

6. By failing to include the registered nurses in the following disputed categories, less any supervisory employees therein within the meaning of Section 2(11) of the Act, the radiology department nurses, employee health nurses, cardiac catheterization laboratory nurses, case manager nurses, pediatric outpatient oncology nurses, and pediatric clinic nurses, in the unit of RNs represented by the Union and applying the contract terms of the collective-bargaining agreement between the parties to these employees, and by refusing to recognize the Union as the bargaining representative of these employees, the Respondent violated Section 8(a)(1) and (5) of the Act.

7. The Patient Care Coordinator Nurses are supervisors within the meaning of Section 2(11) of the Act and therefore should be excluded from the unit of nurses.

8. The above violations constitute unfair labor practices within the meaning of the Act.

[Recommended Order omitted from publication.]